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In the
Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 77-1797

JOSEPH J. C. DiCARLO AND
RONALD C. MacKENZIE,
PETITIONERS,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

FRANCIS J. DiMENTO,
DiMENTO & SULLIVAN,
100 State Street,
Boston, Massachusetts 02109.
(617) 523-5253
Attorney for Petitioner Joseph J.C. DiCarlo.

EARLE C. COOLEY,
HALE & DORR,
60 State Street,
Boston, Massachusetts 02109.
(617) 742-9100

DAVID J. FINE,
ROSENBERG, BAKER & FINE,
133 Mt. Auburn Street
Cambridge, Massachusetts 02138.
(617) 354-2937
Attorneys for Petitioner Ronald C. MacKenzie.

Of Counsel:
ROSENBERG, BAKER & FINE,
133 Mt. Auburn Street,
Cambridge, Massachusetts 02138.
(617) 354-2937

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

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JOSEPH J. C. DiCARLO and
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Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the First Circuit.

Joseph J. C. DiCarlo and Ronald C. MacKenzie petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit entered in this case on April 20, 1978.

Opinions Below

The opinion of the court of appeals, not yet reported, is reproduced in the

Appendix at pp. 1a-16a. The opinion of the district court, also not reported, is reproduced in the Appendix at pp. 17a-31a.

Jurisdiction

The judgment of the court of appeals was entered on April 20, 1978. The time for filing this petition was extended to and including June 19, 1978. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. This case presents a timely opportunity for this Court to define what constitutes a "specific request for exculpatory evidence" as that concept is used in United States v. Agurs, 427 U.S. 97 (1976), and to resolve a sharp conflict between the decision of the First Circuit below and the decision of the Third Circuit in United States v. McCrane, 547 F.2d 204 (1976) with respect to the following question:

Does a pretrial discovery request for disclosure of all statements, promises and rewards given to government witnesses,

constitute a specific request, as defined in Agurs, for favorable letters written by the government to the prospective business customers of a key prosecution witness?

2. This case presents the opportunity for this Court to continue the work it began in Holloway v. Arkansas, 46 U.S. L.W. 4289 (U.S., April 3, 1978) of bringing order and cohesion into the currently confused state of the law on the criminal defendant's constitutional right to the undivided loyalty of his counsel. In particular, this case squarely poses the following questions:

a.i. What must a criminal defendant show to obtain an evidentiary hearing on his claim that he is entitled to a new trial because his trial attorney was involved in a conflict of interest?

ii. Was it proper to deny an evidentiary hearing here where petitioners alleged with particularity (a) that their trial attorneys had a conflict of interest in protecting two prominent Massachusetts public officials, (b) that this conflict infected the attorneys' decision not to

elicit the names of the officials before the jury as recipients of questionable payments from the same firm that was alleged to be the victim of the extortion with which petitioners were charged, and (c) that the decision not to elicit the names prejudiced petitioners' defense?

b. Was it proper to deny summarily petitioners' claim for relief where the court below conceded the interest of the two officials in avoiding exposure but sought to discount the conflict on the basis of speculation that this interest was not as great as petitioners alleged -- speculation contradicted by the political scandal initiated when disclosure of the payments to the public officials ultimately became public 11 months later at the oral argument of petitioners' new trial motion?

c. Was it proper for the court below to evaluate petitioners' conflict of interest claim by a more stringent

test that it would have applied in a case of "joint representation," where one attorney represents two or more defendants in the same case? In particular, was it proper for the court to apply a standard which required petitioners to prove that their trial attorneys subjectively intended to sacrifice their interests to those of the two public officials, and to reject petitioners' claim without even affording petitioners the opportunity to meet that standard at an evidentiary hearing, at which they could question their trial attorneys?

d. Was it proper for the court below to rely on an implicit finding that petitioners had waived their right to the undivided loyalty of their counsel, where that finding was based on the court's speculation and given that petitioners denied waiver and claimed that, as a matter of law, waiver could not be found unless the government carried its burden of proving a "knowing and intelligent waiver" at an evidentiary hearing.

Constitutional and Statutory Provisions Involved

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

The Sixth Amendment to the United States Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . . to have the Assistance of Counsel for his defence."

Section 2255 of Title 28 of the United States Code, establishing the procedure for motions to vacate a sentence imposed by a federal court, provides in pertinent part:

> ". . . Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto."

Statement of the Case

Petitioners were jointly tried and convicted on an eight-count indictment charging conspiracy and substantive violations of the Hobbs and Travel Acts, 18 U.S.C. §§1951 and 1952. These offenses were alleged to have been committed between February 1971 and July 1972, during which period both petitioners were members of the Massachusetts Senate. The essence of the charges against petitioners is that they planned and executed a scheme to extort $40,000 from McKee-Berger-Mansueto, Inc. ("MBM"), a New York based construction management firm. In December 1969, MBM was awarded a multi-million dollar contract to oversee construction of a new campus for the University of Massachusetts at Columbia Point in Boston. In 1971, a legislative committee chaired by petitioner DiCarlo investigated the contract. At petitioners' trial, the prosecution sought to prove that petitioners extorted money from MBM by exploiting its fear that the committee's investigation would result in an unfavorable report

which would jeopardize MBM's contract and financial position generally.

Petitioners' convictions were affirmed on direct appeal, United States v. DiCarlo, 565 F.2d 802 (1977), and this Court denied their petition for certiorari, 46 U.S.L.W. 3586 (U.S., March 20, 1978).

While their direct appeal was pending, petitioners filed a motion for a new trial in the district court on the grounds, inter alia, that:

a. The government suppressed evidence in violation of its duties under Brady v. Maryland, 373 U.S. 83 (1963) and United States v. Agurs, 427 U.S. 97 (1976).

b. Their trial counsel had been involved in a conflict of interest which precluded them from representing their clients with the undivided loyalty the Constitution requires.

Petitioners requested an evidentiary hearing on each branch of their new trial motion and also filed a motion for discovery. The district court, however,

rejected petitioners' motion for discovery and their request for an evidentiary hearing, and summarily denied their new trial motion. See pp. 17a-30a. Petitioners now seek a writ of certiorari to review the decision of the court of appeals affirming this summary rejection of petitioners' claims.

A. Violation of Brady and Agurs

Prior to the commencement of trial on January 24, 1977, the prosecutor, Assistant United States Attorney Edward J. Lee, wrote two letters to prospective customers of MBM. Petitioners contend that these letters were highly critical evidence of promises, inducements or rewards given by the government to the MBM witnesses, and that the government's failure to produce the letters in response to petitioner's pretrial discovery requests violated petitioners' right to a fair trial under Brady v. Maryland, 373 U.S. 83 (1963) and United States v. Agurs, 427 U.S. 97

(1976).

The first letter, dated September 2, 1976, was written in response to a letter from a public agency in New Jersey stating that it was considering awarding a consulting engineer contract to MBM. Mr. Lee's letter stated that the indictment charged that MBM and its principals "were the victims of an extortion scheme," that MBM and its principals were not charged in the indictment as defendants or co-conspirators, and that they "have cooperated from the outset with federal authorities in the conduct of the investigation which led to the indictment." The letter concluded,

> "Further, this office is not aware of any reason why MBM should be disqualified from public work." A.[1] 235.

Mr. Lee's second letter, dated December 10, 1976, was in response to a letter from the mayor's office in San Francisco stating that MBM had been

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[1] "A." denotes references to the appendix filed in the court of appeals.

tentatively selected for participation in a public project, and requesting, among other things, that the United States Attorney in Boston provide the mayor's office with any information

> "that in any way relates to improper activities by this firm [MBM] in its dealings with agencies within your jurisdiction." A. 236.

Mr. Lee's second letter was almost identical to his first and, like the first, concluded with the statement:

> "Further, this office is not aware of any reason why McKee-Berger-Mansueto, Inc. should be disqualified from public work." A. 241.

In United States v. Agurs, 427 U.S. 97 (1976), this Court held that a prosecutor had a constitutional duty to disclose exculpatory evidence that is "material" to the defense. The Court also ruled, however, that the standard of materiality is different when the defense requests specific evidence than when the defense makes no request, or only a general one, for exculpatory material. When a specific request for exculpatory evi-

dence is made, suppression of the evidence will require a new trial so long as the suppressed evidence meets a minimum standard of materiality:

> "[I]f the subject matter of such a [specific] request is material, or indeed if a substantial basis for claiming materiality exists, it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the problem to the trial judge. When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever excusable." 427 U.S. at 106 (emphasis added).

When, on the other hand, no request, or only a general request, for exculpatory evidence is made, the suppressed evidence must meet a more stringent standard of materiality. In such a situation, a new trial will be required only if the trial judge, evaluating the suppressed evidence in the context of the entire trial record, determines that the "omitted evidence creates a reasonable doubt that did not otherwise exist." 427 U.S. at 112.

In their pretrial Consolidated Motion for Discovery, petitioners sought discovery of

> "23. All statements or promises or rewards of any kind, or tending in any way, directly or indirectly, to induce or encourage the giving of testimony, which statements have been made to any persons whom the Government intends to call as witnesses at the trial of the indictment herein.
>
> "24. All evidence of any kind favorable to the defendants material either to guilt or punishment, including without limitation that which may tend to be exculpatory, to impeach or discredit incriminatory evidence or to mitigate the crime charged, or which may lead to evidence of such character." Appendix on Direct Appeal, p. 60.

Petitioners contend that item 23 constituted a specific request within the meaning of Agurs for the letters written by prosecutor Lee and for all communications between the government and the MBM witnesses relating to the letters.

The court of appeals rejected this claim. Opinion, pp. 10a-14a. As demonstrated below, this ruling is squarely in conflict with the decision of the Third

Circuit in United States v. McCrane, 547 F.2d 204 (3d Cir. 1976).

B. Conflict of Interest

The relevant contentions contained in petitioners' new trial motion, which must be accepted as true for present purposes because petitioners' motion was denied summarily, may be summarized as follows.

1. Role of Harrington and Joyce in Directing DiCarlo to Hurley

In June 1975, over one year prior to the return of the indictments in this case, the president of the Massachusetts Senate, Kevin B. Harrington, informed petitioner DiCarlo that he was the subject of a federal criminal investigation.[2] A. 160. Harrington suggested that DiCarlo obtain the services of an attor-

[2] It is unclear how Harrington obtained this information. Petitioners maintain that this in itself is a potentially significant question which they should have been able to explore in an evidentiary hearing.

ney, and recommended Walter J. Hurley. Id. Hurley was at all times relevant to this case associated in the practice of law with Thomas M. Joyce. A. 148, 160, 163, 174. Joyce was a well known lobbyist and lawyer who had particularly close ties with Harrington and former Governor Francis W. Sargent. A. 148, 160, 168. Indeed, petitioners alleged that Joyce was "the attorney, political advisor and close friend and associate" of Harrington and Sargent. A. 148.

Harrington had DiCarlo meet with Joyce who in turn gave DiCarlo instructions for meeting with Hurley. A. 160. At one point, Joyce told DiCarlo that he knew someone in Washington in the Justice Department who would be able to keep him abreast of the progress of the investigation, and thus enable him to alert Hurley of any developments. A. 161.[3]

[3] Like Harrington's intelligence concerning the fact that DiCarlo was the subject of a criminal investigation, Joyce's claim that he had a "source" in the Justice Department is a circumstance that petitioners should have been able to probe in an evidentiary hearing.

2. Circumstances Surrounding Setting and Payment of Hurley's Fee

When DiCarlo first met with Hurley, there was no discussion of fees. A. 161. Subsequently, DiCarlo himself raised the question of fee with Hurley on several occasions, but was told each time by Hurley that Joyce would talk to him. A. 163. On another occasion, DiCarlo raised the subject with Harrington, who told DiCarlo not to worry "because Joyce would take care of Mr. Hurley's fee." Id. Finally, after more insistence on DiCarlo's part, Hurley set a fee of $10,000, $9,500 of which DiCarlo paid in a series of four checks. A. 163. Hurley endorsed each of these checks to the order of Joyce, and each was deposited in the account of Joyce's law firm. Id.

3. Role of Harrington and Joyce in Directing MacKenzie to Mulkern

Petitioner MacKenzie first found out that he was the subject of a criminal investigation from DiCarlo, who had obtained this information from Hurley. A. 161, 176. DiCarlo told MacKenzie he should retain attorney Robert V. Mulkern. A. 176. When MacKenzie informed DiCarlo

that he wanted to retain his present counsel, Earle C. Cooley, DiCarlo became agitated and told MacKenzie it was very important that he retain Mulkern and not Cooley. A. 177. Hurley had told DiCarlo to make sure that MacKenzie retained Mulkern because it was extremely important that MacKenzie be represented by a lawyer who would be friendly to them and with whom Hurley could work cooperatively. A. 161.

Despite misgivings, MacKenzie acceded to DiCarlo's urging and retained Mulkern. A. 177. As the matter progressed, however, MacKenzie became concerned that Mulkern was not giving his case the time and attention it required. A. 177. On more than one occasion, MacKenzie expressed dissatisfication to DiCarlo about Mulkern. Id. DiCarlo reassured MacKenzie that Hurley was leading the defense and had the situation well in hand. A. 162, 177. Joyce told DiCarlo that it was important that Mulkern continue as MacKenzie's attorney, that DiCarlo was only on the perimeter of the investigation and was being hurt by MacKenzie, and that what was done for MacKenzie would be

helpful to DiCarlo. A. 162.

4. Failure of Hurley and Mulkern to Elicit the Names of Harrington and Sargent as Recipients of Suspicious Payments from MBM, and to Pursue the Line of Inquiry Use of the Names Would Have Opened Up

On the sixth day of trial, prosecutor Lee furnished Hurley and Mulkern with materials containing reports of FBI interviews with MBM president McKee, who was then on the stand, and MBM officer, Jack Thomas, who had yet to testify. These materials revealed, inter alia, statements of MBM officials that MBM had made payments to certain Massachusetts politicians, including a $2,000 payment to Senate President Harrington, and two payments of $10,000 each to Albert Manzi, at least one of which was to be a political contribution for then Governor Sargent. A. 26-31.

After this report was turned over to Hurley and Mulkern, they discussed it at a meeting during a recess with DiCarlo and MacKenzie. A. 163-164, 178-178. DiCarlo instructed Hurley without hesitation that

the information concerning the payments to Harrington and Sargent should be used in the defense. Id. DiCarlo said, "Use it, if it's helpful. Bring it out. Withhold nothing." Id. MacKenzie concurred. Id. Nevertheless, despite these instructions, Hurley and Mulkern never elicited the names of the recipients of the payments before the jury.

The failure to elicit the names of Harrington and Sargent was prejudicial to the petitioners because, among other things, use of the names would have laid the groundwork for a defense that MBM's interests were already protected by its payments to officials higher and more powerful than either DiCarlo and MacKenzie and that, consequently, any payments to or for the petitioners could not have been induced by fear or under color of official right. Evidence of the payments to Harrington and Sargent would have shown that MBM had "friends in high places" who could have helped them resist the type of pressure which the MBM witnesses alleged that the petitioners had

communicated. Thus, the evidence would have signficiantly assisted the petitioners in arguing to the jury that any payments to or for the petitioners were no different than the numerous other payments which MBM made to public officials.[4]

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4 In grand jury testimony which he gave in July 1975, MBM employee William F. Harding stated that he had delivered "hundreds" of sealed envelopes containing "campaign contributions" to government officials "all over the country." Appendix on Direct Appeal, pp. 910-911.

Reasons for Granting the Writ

I. Certiorari should be granted to resolve the sharp conflict between the First Circuit's decision below and the Third Circuit's decision in United States v. McCrane on what constitutes a "specific request" for exculpatory evidence within the meaning of Agurs.

As indicated above, this Court held in Agurs that a prosecutor has a constitutional duty to disclose exculpatory evidence that is "material" to the defense, and that the standard of materiality is substantially different when the defense makes a specific request for exculpatory evidence than when it makes no request, or only a general one. But although the differing standards of materiality are defined by the Court with some precision, the opinion in Agurs contains no guidelines for determining when a request should be deemed "specific" and when "general." The only guidance the opinion provides is in the form of a few, sparse illustrations. Thus, the Court gives as an example of a specific request the request made in Brady itself, where defense counsel sought all extrajudicial

statements made by Brady's accomplice, Boblit. 427 U.S. at 104. And, the Court gives as examples of general requests, a request for "all Brady material" or "anything exculpatory." 427 U.S. at 106. Beyond these few examples, however, the Court leaves the task of definition to another day.

The present case is an ideal vehicle for the Court to take up where it left off in Agurs. The facts here are remarkably similar to those in United States v. McCrane, 547 F.2d 204 (3d Cir. 1976)("McCrane II"), reaffirming United States v. McCrane, 527 F.2d 906 (3d Cir. 1975)("McCrane I"), after remand for further consideration in light of United States v. Agurs, 427 U.S. 97 (1976). In McCrane, as here, the prosecutor failed to disclose letters he had written to prospective customers of a key government witness. And in McCrane II, as here, the issue arose as to whether a discovery request made by the defense constituted a "specific request" for the letters within the meaning of Agurs. In McCrane, the request at issue sought

> "[M]aterial which may be used to impeach prosecution witnesses, including but not limited to any standards used by the Department of Justice, the Treasury Department, the Internal Revenue Service or the United States Attorney in declining prosecution of similar cases." 547 F.2d at 207.

The Third Circuit held that this request was sufficiently focused to invoke the "specific request" standard of materiality under Agurs. The court stated, in words that apply with even greater force here:

> "It requires no profound intellectual analysis to perceive that the defense was seeking material that might provide a basis for a claim of prosecutorial favoritism or preferential treatment of government witnesses." 547 F.2d at 207.

Moreover, it must be emphasized that in arguing McCrane II before the Third Circuit, the government explicitly conceded that McCrane's request

> "'would have been sufficiently specific if it had requested disclosure of all promises made to the witness and all actions undertaken on the witness' behalf or at the witness' request.'" 547 F.2d at 208.

In other words, the government conceded in McCrane that precisely the type of request the petitioners made here was a specific request, within the meaning of Agurs, requiring disclosure of the type of recommendation letters at issue here.

Nevertheless, despite this concession by the government in McCrane,[5] and despite the fact that McCrane II was decided two months before the commencement of trial here, thus putting the government on notice that the letters at issue here constituted Brady material which it was required to disclose, the court of appeals below holds that the government's failure to disclose the

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5 Indeed, far from appreciating the significance of the government's concession in McCrane, the court below actually seeks to use the concession as a means for distinguishing McCrane by suggesting that the Third Circuit would not have ruled as it did had the concession not been made. Opinion, p. 13a. The court below refuses to recognize the possibility that the government made the concession it did in McCrane because the concession represented its view of the law, and that the Third Circuit relied on the concession because it concurred in that view.

letters was not a violation of petitioners' constitutional rights. In so ruling, the court places itself squarely in conflict with the ruling of the Third Circuit in McCrane. Thus, the court below states that it views the McCrane request as "a classic example of a non-specific request as defined in Agurs, and decline[s] to accept McCrane's contrary view" (Opinion, p. 13a).[6] This candid acknowledgement of disagreement sets the stage for a definitive resolution of the matter by this Court.[7]

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6 The court below also states that it rejects McCrane's statement that "the mere act of writing the letters was preferential treatment," unless "read in conjunction with the evidence, elswhere noted, that they were written at the request of the witness's counsel." Opinion, p. 13a.

7 One further aspect of the opinion below should be noted. In ruling that petitioners' discovery request was not a specific request within the meaning of Agurs, the court of appeals relies in part on a one-page affidavit submitted by prosecutor Lee. At first glance this affidavit (reproduced at pages 32a-33a of the appendix hereto) appears to contain a categorical denial that prosecutor Lee or anyone else associated with the

(cont. on page 26)

7 (cont. from page 25)

government to his knowledge, ever had any discussion with any MBM witness concerning the letters at issue here. Indeed, the court of appeals appears to have accepted the affidavit as containing such a denial. Opinion, p. 14a. In fact, a close reading of the affidavit reveals that it actually says nothing at all about the letters in question. The affidavit speaks only of "letters of recommendation" and specifically denies that Lee ever wrote "such a letter of recommendation." Since Lee obviously wrote the letters in question here, it is plain that the affidavit does not consider the letters here as letters of recommendation. Thus, the affidavit leaves entirely open the question of whether the letters at issue here were ever discussed with any MBM witness. At the very least, this defect in Lee's affidavit entitles petitioners to an evidentiary hearing on the issue of whether such discussions ever took place.

II. Certoriari should be granted to enable this Court to continue the work it began in Holloway v. Arkansas of bringing order and cohesion into the currently confused state of the law on the criminal defendant's constitutional right to the undivided loyalty of his counsel. In particular, this case provides an ideal vehicle for clarifying when a defendant is entitled to an evidentiary hearing on his claim that a new trial is required because his attorney was involved in a conflict of interest.

A. Introduction

This case presents a timely opportunity for this Court to resolve important issues concerning a criminal defendant's constitutional right to the undivided loyalty of his counsel.

This Court recognized the right to undivided loyalty of counsel as a distinct component of the constitutional right to effective representation over 35 years ago in Glasser v. United States, 315 U.S. 60 (1942). Since that time, the perception of the importance of that right has been greatly intensified. E.g., Von Moltke v. Gillies, 332 U.S. 708

(1948);[8] Porter v. United States, 298 F.2d 461 (5th Cir. 1962).[9]

But while courts agree in principle about the importance of the right to the undivided loyalty of counsel, there has been a great deal of disagreement and confusion about how that right should be enforced. In particular, courts have differed widely on what a defendant who claims that his right to undivided loaylty has been violated must show in order to obtain relief. What constitutes

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8 "The right to counsel guaranteed by the Constitution contemplates the services of an attorney devoted solely to the interests of his client . . . .

"Undivided allegiance and faithful, devoted service to a client are prized traditions of the American lawyer. It is this kind of service for which the Sixth Amendment makes provision." 332 U.S. at 725-726.

9 In Porter, the Fifth Circuit declared that a defendant is constitutionally entitled to

"a vigorous advocate having the single aim of acquittal by all means fair and honorable [and who is not] hobbled or fettered or restrained by commitments to others." 298 F.2d at 463.

a conflict of interest? What evidence must the defendant adduce to establish a conflict of interest? Is proof that a conflict of interest existed sufficient to entitle the defendant to relief, or must the defendant also show that he was "prejudiced" by the conflict? If an independent showing of "prejudice" is necessary, what constitutes prejudice for this purpose, and what does the defendant have to do to demonstrate it? There is substantial disagreement about all of these questions, as well as a great many others. Indeed, a commentator writing in 1977 lamented:

"The courts, however, have been unable to agree on any coherent and uniform standard for determining what constitutes a conflict of interest . . . . [N]ot only is there confusion, but these differing views pervade each area of the law . . . .

"Yet for all this confusion and disagreement, the Supreme Court has refused to consider the problem in any meaningful way. Each circuit continues to struggle to formulate its own rules and approaches. Each year the confusion grows greater among the circuits. The end result is that the law with regard to the

> sixth amendment right to the effective assistance of counsel has developed without cohesion of thought or unity of purpose." Hyman, Joint Representation of Multiple Defendants in a Criminal Trial: The Court's Headache, 5 Hofstra Law Review, 315, 318-320 (1977)(footnotes omitted).

In Holloway v. Arkansas, 46 U.S.L.W. 4289 (U.S., April 3, 1978), this Court took the first step toward bringing order and cohesion into this area of the law. But even in the course of its opinion, this Court referred to issues "on which the courts have taken divergent approaches" which the decision in Holloway would not resolve. 46 U.S.L.W. at 4291. In particular, the Court stated that:

> "appellate courts have differed on how strong a showing of conflict must be made, or how certain the reviewing court must be that the asserted conflict existed, before it will conclude that the defendants were deprived of their right to the effective assistance of counsel." Id.

The present case provides an ideal opportunity to resolve this issue, expressly left open by Holloway, and to continue the work of bringing "cohesion

of thought" and "unity of purpose" into the currently confused state of the law on the defendant's right to the undivided loyalty of counsel.

B. Evidentiary Hearing

The present case provides a timely opportunity for this Court to clarify the standards for determining when a criminal defendant is entitled to an evidentiary hearing on his claim that a new trial is necessary because his attorney was involved in a conflict of interest.

1. Judicial Notice of Facts Relating to the Investigation of the MBM Matter

To put petitioners' demand for an evidentiary hearing in context, it is necessary for the Court to take judicial notice of certain facts. This is in keeping with the decision of the court of appeals, which found that it could take judicial notice "of the present widespread concern over the MBM matter." Opinion, p. 7a, n. 4.

As indicated above, the federal prosecutor disclosed to petitioners' trial counsel the evidence of the MBM payments

to Harrington and Sargent on February 1, 1977. That evidence did not become public during the trial, or indeed for 11 months afterward. In fact, the evidence only became public in late December 1977 when oral argument was heard in open court on petitioners' motion for a new trial.[10] The public disclosure of this evidence touched off one of the largest scandals in Massachusetts history -- a scandal that has spawned numerous investigations into the awarding of the MBM contract and into the awarding of state construction contracts in general.[11] The principal investigation which has been conducted thus far is that of the Massachusetts legislature's Committee on Post Audit and Oversight, which has taken sworn testimony from numerous witnesses including Harrington and Sargent. New

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10 See The Boston Globe, December 24, 1977, p. 1, col. 1-6; The Boston Herald American, December 24, 1977, p. 1, col. 1-6.

11 See, e.g., "Anatomy of a Scandal 1964: U Mass Boston is born, 1978: MBM probe goes on," The Boston Herald American, March 14, 1978.

disclosures concerning the MBM matter have appeared almost daily on the front pages of Massachusetts newspapers ever since late December 1977, and a number of the investigations into the MBM matter are still in progress and are expected to remain in progress for months to come.

In stark contrast to the burst of investigatory activity which it initiated, petitioners' motion for a new trial was summarily denied without affording petitioners the right to pursue their claims in court through the discovery process or through an evidentiary hearing. This summary denial was in plain violation of petitioners' constitutional rights.

2. Legal Standards for Evidentiary Hearing

Although, when petitioners initially asserted their claim of conflict of interest they were not yet in custody, both the district court and the court of

appeals treated the claim as falling under 28 U.S.C. §2255. That statute provides that a defendant must be granted an evidentiary hearing

> "[u]nless the motion and the files and records of the case conclusively show that [he] is entitled to no relief."

Accordingly, this Court has made it clear that where the facts forming the basis of a §2255 motion fall outside the record, an evidentiary hearing is mandatory. Machibroda v. United States, 386 U.S. 487 (1962).

Similarly, in Blackledge v. Allison, 97 S.Ct. 1621 (1977), this Court held that a state prisoner's petition for habeas corpus could not be summarily denied where the allegations of his petition were not "vague or conclusory," and where it could not be said that the allegations, when viewed against the record, were "palpably incredible" or "patently frivolous or false." 97 S.Ct. at 1630. The Court ruled that just as a motion for summary judgment in a civil case must be denied where there is a genuine issue of material fact, so a motion to dismiss a habeas

petition summarily must be denied where the petition's

> "facially sufficient allegations have sufficient basis in fact to warrant plenary presentation of evidence." 97 S.Ct. at 1632.

Applying these principles to petitioners' conflict of interest claim, there can be no question that the courts below erred in denying petitioners an evidentiary hearing especially in light of the nature of petitioners' claims. Courts view conflicts of interest with particular concern because they infect and distort the judgment of defense counsel in ways that are often not reflected in the trial record.

> "Like the famous tip of the iceberg, the record may not reveal the whole story; apparently minor instances in the record which suggest co-defendants' conflicting interest may well be the telltale signs of deeper conflict." Lollar v. United States, 376 F.2d 243, 246-247 (D.C.Cir. 1967).

Accordingly, courts have not hesitated to reverse the denial of a conflict of interest claim where the defendant has been deprived of the opportunity for an evidentiary hearing. E.g., Porter v.

United States, 298 F.2d 461 (4th Cir. 1962); Zurita v. United States, 410 F.2d 477 (7th Cir. 1969).

Petitioners' right to an evidentiary hearing becomes even clearer when the rules regarding a criminal defendant's right to the undivided loyalty of his counsel are brought into proper focus.

C. Elements of Claim that the Constitutional Right to the Undivided Loyalty of Counsel Has Been Violated.

In order for a defendant to establish that he has been deprived of the undivided loyalty of his counsel, it is sufficient for him to demonstrate: first, that his counsel was committed to an interest potentially in conflict with the defendant's interests; second, that his counsel made a choice between possible alternative courses of action -- such as pursuing (or failing to pursue) a particular line of cross-examination -- which could plausibly be construed as favoring the conflicting interest at the expense of the defendant's interest; and third, that the course of action foregone by his counsel was a plausible one. See Comment,

Conflict of Interest in Multiple Representation of Criminal Co-Defendants, 68 Journal of Criminal Law & Criminology, 226, 231-233 (1977).

The defendant is not required to prove that his attorney did in fact sacrifice the defendant's interest on account of his obligation to the conflicting interest. The unfairness of requiring proof of subjective motivation is obvious, considering the difficulty a defendant would have in getting his attorney to admit that he consciously compromised his client's interests. Consequently, a defendant need show only that the conflict in which his attorney was involved impinged on a choice made by the attorney in such a way that the choice was not, in the objective sense, the free choice of a disinterested attorney.[12]

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12 Indeed, courts have often not inquired into, or have even disregarded, counsel's own evaluation of the extent to which conflicting obligations impeded defense strategy. "[B]eyond determining whether the foreclosed defense was plausible, we are reluctant to speculate on what defenses

(cont. on page 38)

12 (cont. from page 37)

counsel may have chosen . . . ." Foxworth v. Wainwright, 516 F.2d 1072, 1080 (5th Cir. 1975).

The governing principle was well summarized in Comment, Conflict of Interests in Multiple Representation of Criminal Co-Defendants, 68 Journal of Criminal Law & Criminology 226, 231 (1977):

> "The question is not whether counsel actually perceived the conflict, or whether he would in fact have chosen to conduct the defense differently had there been no conflict. In fact, an attorney's skill in dealing with inconsistent interests by even handed compromise may even obscure on the record the basic unfairness to a defendant of subordinating his legitimate interests to other considerations. Thus it should be clearly recognized that although defense tactics provide the evidence from which a conflict can be inferred, trial strategy is evaluated only in the sense that counsel must have been free to choose an appropriate defense" (footnotes omitted)(emphasis in original).

But it must be emphasized that while courts often disregard an attorney's denial that his advocacy was impaired by a conflict of interest, they often assign substantial, if not dispositive weight, to an attorney's admission that his advocacy was or would be impaired by a conflict. Holloway v. Arkansas, 46 U.S.L.W. 4289 (U.S., April 3, 1978); Glasser v.

(cont. on page 39)

Moreover, the defendant is also not required to demonstrate that had his counsel chosen the foregone alternative, the outcome of the trial would have been affected. As indicated above, it is sufficient for the defendant to show that the foregone alternative was a plausible one. United States v. Donahue, 560 F.2d 1039, 1044-1045 (1st Cir. 1977);[13] Foxworth v. Wainwright, 516 F.2d 1072, 1080 (5th Cir. 1975); footnote 12 supra. As with other types of violations of the right to the effective assistance of counsel, the harmless error rule does not apply to violations of the right to undivided loyalty. Holloway v. Arkansas, 46 U.S. L.W. 4289, 4293 (U.S., April 3, 1978); Glasser v. United States, 315 U.S. 60, 76 (1942); Chapman v. California, 386 U.S. 18, 23 n. 8 (1967).

12 (cont. from page 38)

United States, 315 U.S. 60 (1942); United States v. Hurt, 543 F.2d 162 (1976). This is important here because by denying defendants an evidentiary hearing, the courts below deprived the defendants of an opportunity to question their trial counsel about their own assessment of the impact of the conflict of interest.

13 See page 40.

D. Application of Legal Principles Here

Applying these principles here, it is plain that petitioners are entitled to relief. Given the working relationship between Joyce, on the one hand, and Hurley and Mulkern on the other,[14] given Joyce's close relationship with Harrington and Sargent, and given the direct role which Harrington and Joyce jointly played in

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13 (from page 39)

In Donahue, the court granted the defendant a new trial because his trial counsel had been involved in a conflict of interest which may have affected the decision to reject an alternative trial strategy. But in so ruling, the court specifically acknowledged that the strategy actually chosen may have been superior to the rejected strategy.

14 Where, as here, attorneys (such as members of the same law firm) are involved in a coordinated working relationship where there is a free flow of information, the interests of one will be imputed to his colleagues for the purpose of ascertaining whether there is a conflict of interest. See United States v. Donahue, 560 F.2d 1039, 1042 (1st Cir. 1977); Commonwealth v. Geraway, 364 Mass. 168, 301 N.E.2d 814 (1973); Cinema 5, Ltd. v. Cinema, Inc., 528 F.2d 1384 (2d Cir. 1976); Laskey Bros., Inc. v. Warner Bros. Pictures, Inc., 224 F.2d 824 (2d Cir. 1955).

ensuring that the petitioners were represented by Hurley and Mulkern, it is clear that Hurley and Mulkern had commitments to persons -- Harrington and Sargent -- whose interests were at least in potential conflict with the petitioners' interests. Harrington and Sargent plainly had a vital stake in not having their names exposed in a public trial as the recipients of payments from MBM -- payments facially illegal if for no other reason than that they were in violation of Massachusetts State law prohibiting campaign contributions by corporations. Indeed, the substantiality of the interest Harrington and Sargent had in non-disclosure was graphically demonstrated by the storm of adverse publicity generated when the evidence of the payments to Harrington and Sargent first became public at the oral argument of petitioners' new trial motion in the district court.

Thus, since it is plain that there was a potential conflict between the interests of Harrington and Sargent, on the one hand, and DiCarlo and MacKenzie, on the other, the only further question is

whether trial counsel made a choice between alternative courses of action which was infected by that conflict. Petitioners submit that there is no question that trial counsel's decision not to elicit the names of Harrington and Sargent, and not to pursue the line of defense which use of the names would have made possible, was just such a choice.

The court of appeals' attempt to discount the significance of the conflict cannot succeed. The court states:

> "Concededly, Harrington and Sargent would have preferred not to be mentioned as recipients of possibly illegal payments,[4] but, aside from that publicity, they have not been shown to have any other interest inconsistent with those of the defendants.

"[4] In light of the present widespread concern over the MBM matter, of which we may take judicial notice, viewed by hindsight it would have been a considerable benefit to Harrington to have avoided the subject of the $2,000 check, provided that such silence would have ended the matter. However, this information was in the government's possession to begin with, and silence could not have been assured, regardless of whether defense attorneys

> pursued this line of inquiry." Opinion, p. 7a.

The irony of this analysis is considerable. To attempt to diminish the evidence of conflict by saying that Harrington and Sargent had no conflicting interest aside from that of avoiding adverse publicity is like saying a soldier has nothing to fear aside from getting killed. The magnitude of the interest which Harrington and Sargent had in avoiding public exposure is measured precisely by the magnitude of the scandal initiated when the evidence of the payments was made public 11 months later. Nor is the court persuasive when it maintains that the conflicting interest which Harrington and Sargent had was diminished by the fact that the evidence of the payments was already in the government's possession. The evidence had presumably been in the government's possession for months when the prosecutor disclosed it to Hurley and Mulkern, and for all they knew, the government never had any intention of making the evidence public. (And, in fact, the government did not make the evidence public during the 11 months after

this disclosure to counsel although it had ample opportunity to do so.) Moreover, the affidavits annexed to petitioners' new trial motion plainly establish that Hurley and Mulkern were fully aware of the enormous political impact which disclosure of the evidence would have. Indeed, petitioner MacKenzie's affidavit reports that Hurley stated that the evidence "could blow the dome off the State House." A. 178. In sum, there can be no question that Harrington and Sargent had a vital interest in not being identified as the recipients of MBM payments, and that Hurley and Mulkern were fully aware of that interest.

There can also be no question that the decision not to elicit tne names of Harrington and Sargent before the jury, and not to pursue the line of defense which use of the names would have made possible, represented a choice between alternative courses of action that was infected by a conflict of interest. The court of appeals argues that "there were substantial risks involved in using these names which prudent counsel might very reasonably wish to avoid." Opinion, p. 6a.

But, as demonstrated above, the issue is not whether disinterested counsel could have come to the same ultimate conclusion as Hurley and Mulkern. The issue is rather whether the choice confronting Hurley and Mulkern was a free choice which they could make with only their clients' interests in mind. The facts set forth above clearly show that it was not such a free choice.

The only remaining question is whether the alternative foregone by Hurley and Mulkern -- use of the names of Harrington and Sargent -- could plausibly have benefited petitioners. As indicated above, petitioners maintain that use of the names could have benefited them because it would have laid the groundwork for a "friends in high places" defense. The court of appeals seeks to discredit this defense by saying:

> "The suggestion that $2,000 purchased all-risk insurance, or that Harrington, for that amount, if requested, would have gone to DiCarlo and said, 'You lay off,' is not credible. Even less persuasive would be the thought that Sargent, the Republican governor, could have gone

> to the Democratic chairman purportedly investigating the propriety of a Republican-let contract, and said that MBM had paid enough already." Opinion, pp. 6a-7a.

Two points must be made in response. First, this conclusory dismissal of the "friends in high places" defense is founded on nothing more than the court's own speculation. Petitioners submit that the court's speculation is incorrect and that the evidence of the payments to Harrington and Sargent, when coupled with the other evidence in the case, may very well have persuaded the jury that MBM's claim of extortion was at least subject to a reasonable doubt. The test, moreover, is not whether the defense would have succeeded; it is rather whether the defense was plausible. There can be no question that the "friends in high places" defense meets this test.

Second, the court of appeals' speculation about the "friends in high places" defense is totally unwarranted because there exists a ready means for obtaining direct evidence. There is no justification for speculating on what Harrington or Sargent would or would not have done,

or what MBM officials would or would not have done, when it is possible to explore these questions directly in an evidentiary hearing. The law requires that before petitioners' claim could possibly be rejected on the ground that the "friends in high places" defense was implausible, petitioners would have to be given an opportunity to develop that defense in an evidentiary hearing.

In sum, under the three-part analysis described above, it is plain that petitioners are entitled to relief.

E. The Erroneous Legal Analysis Adopted by the Court Below: The Bifurcation Between Dual Representation Standards and Joint Representation Standards

Rather than applying the three-part analysis described above, the court of appeals applies a different legal analysis. In Miller v. United States, 564 F.2d 103 (1st Cir. 1977), the court of appeals distinguished between cases of "joint" representation, where the "attorney's purported conflict of interest arises from the simultaneous representation of two or more codefendants in a

single cause" and cases of "dual" representation, where the purpoted conflict arises from the attorney's concurrent representation of someone who was or might have been called as a witness. 564 F.2d at 106. The court stated:

> "Only a relatively slight showing of actual prejudice is required in joint representation cases, where an attorney is particularly susceptible to disabling conflicts . . . But in a 'dual' representation case . . . a real conflict or specific instance of prejudice must be shown to establish the deprivation of effective assistance of counsel." Id.

In joint representation cases, the court does apply essentially the three-part analysis described above. See, e.g., United States v. Donahue, 560 F.2d 1039 (1st Cir. 1977). But in dual representation cases, the court applies a more exacting analysis which requires the defendant to establish "a real conflict or specific instance of prejudice." Miller v. United States, 564 F.2d at 106. Four points should be made.

First, petitioners maintain that the court of appeals' bifurcation of legal standards -- one set of standards for joint representation cases, another set for dual representation cases -- is

totally improper. The court's only justification for such bifurcation is that any attorney in joint representation cases is "particularly susceptible to disabling conflicts." Miller v. United States, 564 F.2d at 106. But while the generalization that an attorney in joint representation cases is more likely to be susceptible to disabling conflicts than an attorney in dual representations cases, may have some validity in a statistical sense, it is difficult to see how that generalization advances legal analysis in a particular case. The only legitimate way to determine wehther a defendant's right to undivided loyalty has been violated is to examine the facts of each particular case.

Second, the court's standards for dual representation cases are hoplessly unclear. The court does not define, either in Miller or its opinion here, "real conflict" or "specific instance of prejudice" and does not explain how these concepts differ from the concept of the "relatively slight showing of actual prejudice" that will require relief in a joint representation case. From its

opinion here, it appears that the court is saying that to obtain relief in a dual representation case, it is necessary for the defendant to show that his attorney subjectively intended to sacrifice his client's interests in favor of the conflicting interest. But as indicated earlier, it is grossly unfair to require a defendant to prove his attorney's subjective motivation in any case, be it one of joint or dual representation, in view of the obvious difficulty a defendant would have in getting his attorney to admit that he consciously compromised his client's interests. Thus, it is clear that the three-part analysis described earlier must be applied equally to all conflict cases, regardless of whether they are cases of joint or dual representation, or, for that matter, any other type of case where a claim of conflict is made.

Third, even assuming that the court below is correct in applying different standards to joint and dual representation cases as a general matter, the court was wrong in applying dual, rather than joint, representation standards here.

Although Harrington and Sargent were not technically the codefendants of petitioners, their position was thoroughly analogous to that of codefendants. Hurley and Mulkern were called upon to protect two sets of persons (petitioners, on the one hand; Harrington and Sargent, on the other) who both faced serious liability arising out of a related set of transactions. The court argues that the liability which Harrington and Sargent faced was significantly different from the petitioners' liability because disclosure of their names to the jury

> "could not have increased their potential criminal liability, nor could any tactic by defendants' counsel have decreased that liability. Even if their names were not used, neither Harrington or Sargent, nor Joyce or Hurley could insure that the information, which the government already had, would not be revealed." Opinion, pp. 8a-9a.

But this takes an overly restrictive view of what Harrington and Sargent had to lose from exposure. For one thing, Harrington and Sargent faced the possibility of prosecution by state, as well as federal, authorities. For another, it is not

unknown for public opinion to exert impact on the decision as to whether public officials will be prosecuted. For a third, the interest which Harrington and Sargent had in avoiding public exposure was certainly great enough by itself, putting aside any question of criminal liability, to provide a strong incentive to Hurley and Mulkern to avoid that exposure to any extent possible. If anything, the conflict confronting Hurley and Mulkern was far more severe than the conflict usually present in a joint representation case precisely because the evidence against Harrington and Sargent was not public. Thus, joint representation standards should have been applied a fortiori.[15]

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15 It should also be noted that one of the court's reasons for not applying joint representation standards is the incorrect statement that

> "defendants do not claim that there ever was any attorney-client relationship between Joyce, Hurley or Mulkern and Harrington or Sargent." Opinion, p. 8a.

In fact, petitioner's new trial motion

(cont. on page 53)

Fourth, even assuming -- contrary to fact -- that the court of appeals was correct in ruling that dual representation standards should be applied to the present case, the court's decision must still be reversed because petitioners were denied an evidentiary hearing. As indicated above, the court of appeals' dual representation standards appear to require that in order to obtain relief, a defendant must show that his attorney subjectively intended to sacrifice his client's interests in favor of a conflicting interest. This requirement is hard enough to meet when the defendant has been granted an

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15 (cont. from page 52)

alleges:

> "Mr. Joyce was and is the attorney, political advisor and close friend and associate of Governor Francis W. Sargent and Senate President Kevin B. Harrington." A. 148 (emphasis added).

Moreover, if the precise relationship between Joyce, Hurley and Mulkern, on the one hand, and Harrington and Sargent, on the other, is critical to whether petitioners are entitled to relief, they should be granted an evidentiary hearing to explore that relationship.

evidentiary hearing. Where, as here, such a hearing has been denied, it is virtually impossible. The court of appeals states:

> "Taking . . . the issue whether trial counsel in fact gave weight to the interests of Harrington and Sargent, there is no direct testimony, nor could any reasonably be expected." Opinion, p. 4a.

Given that one of the prime reasons petitioners requested an evidentiary hearing was so that they could subpoena their trial counsel as witnesses, this statement is extraordinary. There is "no direct testimony" on whether Hurley and Mulkern in fact gave weight to the interests of Harrington and Sargent only because petitioners were precluded from obtaining that testimony through denial of an evidentiary hearing.

Nor can it be validly suggested that petitioners have failed to adduce enough evidence to justify an evidentiary hearing on the actual motivation of their trial counsel. The aggressive role which Harrington and Joyce took in seeing to it that petitioner DiCarlo was represented by Hurley, and that petitioner MacKenzie was represented by Mulkern; the inside

information which Harrington had about the investigation of DiCarlo; Joyce's claim that he had a source in the Justice Department; and the irregular manner in which Hurley's fee was set -- all of these circumstances are indicative enough of a conscious attempt to manipulate petitioners' defense so as to require full exploration of the issue at an evidentiary hearing.

F. The Court of Appeals' Invalid Finding of Waiver

In an effort to buttress its conclusion that petitioners are not entitled to relief, the court of appeals concludes its discussion of their conflict claim as follows:

> "Particularly is there a heavy burden of a defendant when the facts were known to him from the beginning, United States v. James, 5 Cir., 1975, 505 F.2d 898, cert. denied, 421 U.S. 1000, or, as in this case, long before the trial ended instead of afterwards. Defendants selected Hurley precisely because Joyce had political connections. Such connections are not simplistic, but extend in many directions. The least defendants could expect was the possibility of some interface. The least

> that, in turn, could be expected of defendants would be to make their own decisions when some such matters surfaced. Defendants were in no respect naive or unsophisticated. Nothing was concealed from them, including the fact that day after day the trial was proceeding without their counsel disclosing the names to the jury. They do not excite our sympathy when, having lost their case, they malign their counsel, and say they were put upon." Opinion, p. 9a.

Although the court does not characterize it as such, this plainly amounts to a finding that the petitioners waived their rights. Moreover, it is finding unaided by an evidentiary hearing and based on little more than the court's speculation. Given that a waiver cannot be validly found unless the government carries its burden of showing that the defendant made a "knowing and intelligent waiver" of his right to undivided loyalty, it is plain that the court's reliance on waiver was grossly improper. This is especially true because

> "Every reasonable presumption against the waiver of fundamental rights is made in order to protect Sixth Amendment rights." Austin v. Erickson, 477 F.2d 620 (8th Cir. 1973).

Indeed, what the court stated in United States v. LaVallee, 282 F.Supp. 968, 971 (E.D.N.Y. 1968) applies with equal force here:

> "[P]etitioner did not learn of the conflict until during the trial, and may not be said to have assented to it by his silence. It is understandable that a criminal defendant, not necessarily familiar with all of his constitutional rights . . . might not interrupt his trial to request that his attorney be relieved . . . ."

Even where a defendant is well schooled in the law a waiver of the right to the undivided loyalty of counsel will not lightly be inferred. Glasser v. United States, 315 U.S. 60, 70 (1942)(failure of Glasser to object to joint representation held not a waiver of his right to undivided loyalty even though Glasser was an experienced attorney).

Conclusion

The petition for a writ of certiorari should be granted.

Dated: June 1978

Respectfully submitted,

FRANCIS J. DIMENTO
DIMENTO & SULLIVAN
100 State Street
Boston, Massachusetts

Attorneys for Petitioner
Joseph J.C. DiCarlo

EARLE C. COOLEY
HALE AND DORR
60 State Street
Boston, Massachusetts

DAVID J. FINE
ROSENBERG, BAKER & FINE
133 Mt. Auburn Street
Cambridge, Massachusetts

Attorneys for Petitioner
Ronald C. MacKenzie

Of Counsel:

ROSENBERG, BAKER & FINE
133 Mt. Auburn Street
Cambridge, Massachusetts

United States Court of Appeals
For the First Circuit

No. 78-1026

UNITED STATES OF AMERICA,
APPELLEE,

v.

JOSEPH J. C. DiCARLO and
RONALD C. MacKENZIE,
DEFENDANTS, APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Walter Jay Skinner, *U.S. District Judge*]

Before Coffin, *Chief Judge*,
Aldrich and Campbell, *Circuit Judges*.

Francis J. DiMento and *Earle C. Cooley*, with whom *DiMento & Sullivan* and *Hale and Dorr* were on brief, for appellants.
Edward J. Lee, First Assistant United States Attorney, with whom *Edward F. Harrington*, United States Attorney, and *Alan D. Rose*, Assistant United States Attorney, were on brief, for appellee.

April 20, 1978

Aldrich, *Senior Circuit Judge*. This is an appeal from the denial of a new trial. Appellants, Joseph J. C. DiCarlo and Ronald C. MacKenzie, hereinafter defendants, were found guilty after a jury trial in the district court of conspiracy to violate, and of substantive violations of, the Hobbs and Travel Acts, 18 U.S.C. §§ 1951 and 1952. The offenses involved the extortion by defendants, then Massachusetts state senators, of $40,000 from McKee-Berger-Mansueto, Inc. (MBM), a New York based construction

management firm, in connection with a report by a legislative committee chaired by DiCarlo concerning a state contract with MBM. While their principal appeal was pending, defendants moved the district court for a new trial, alleging, (1) constitutionally defective representation by defense counsel because of a conflict of interest, and because of incompetence; (2) a due process violation by the U.S. Attorney's failure, in response to a discovery request, to turn over certain letters allegedly having impeachment value in regard to a key government witness; (3) jury misconduct; and (4) newly discovered evidence, in the form of recantation of the testimony of certain witnesses. In connection therewith, defendants requested an evidentiary hearing.

In an extensive opinion, the district court denied defendants' motion. Almost coincidentally, we rejected the principal appeal. *United States* v. *DiCarlo*, 1 Cir., 1977, 565 F.2d 802. Being of the view that our decision was uncertworthy, First Circuit Rule 17, we denied bail pending petition therefor. Certiorari was thereafter denied, 46 U.S.L.W. 3586 (U.S., Mar. 21, 1978). In addition, in an unpublished memorandum, we refused to stay the district court's refusal of bail pending the present appeal.

At the outset is the threshold issue of the proper standard of review for a case in this posture. The government, focusing upon the fact that the relief sought is a new trial, argues that the decision below may not be reversed absent proof that the trial court committed an abuse of discretion —the standard applied for motions for new trials under F.R.Crim.P. 33. *See United States* v. *Zannino*, 1 Cir., 1972, 468 F.2d 1299, 1303, *cert. denied*, 410 U.S. 954. The district court, however, although defendants were not then in custody, treated their first three claims as falling under 28 U.S.C. § 2255, and only the last as of the discretionary scope of Rule 33. We agree.

In seeking collaterally to attack their convictions under section 2255, defendants bear the burden of establishing by a preponderance of the evidence that they are entitled to relief. *Coon* v. *United States*, 5 Cir., 1971, 441 F.2d 279, *cert. denied*, 404 U.S. 860. This includes the burden of showing that they are entitled, if they claim it, to an evidentiary hearing. Rule 4(b) of the Rules Governing Section 2255 Proceedings provides that the trial court may examine the record, the moving papers and any exhibits and affidavits submitted therewith and, on the basis of those materials, may summarily dismiss the motion if it "plainly appears . . . that the movant is not entitled to relief." *See Miller* v. *United States*, 1 Cir., 1977, 564 F.2d 103, 106; *Moran* v. *Hogan*, 1 Cir., 1974, 494 F.2d 1220. While genuine issues of material fact may not be resolved without a hearing, *see Blackledge* v. *Allison*, 1977, 431 U.S. 63, 80-81, a hearing is not necessary "when a § 2255 motion (1) is inadequate on its face, or (2) although facially adequate, is conclusively refuted as to the alleged facts by the files and records of the case." *Moran* v. *Hogan*, ante, 494 F.2d at 1222. Moreover, if the claim is based upon facts with which the trial court, through review of the record or observation at trial, is familiar, the court may make findings without an additional hearing, and, as is the case for findings of the trial court generally, those findings will not be overturned unless they are clearly erroneous. *Bartelt* v. *United States*, 5 Cir., 1974, 505 F.2d 647; *Zovluck* v. *United States*, 2 Cir., 1971, 448 F.2d 339, *cert. denied*, 405 U.S. 1043.

Ineffective assistance of counsel.

Defendants' attack upon trial counsel is in three layers. One is, broadly, that they were incompetent. This is a serious accusation to make against reputable and experienced attorneys. The court found it in no way borne out.

We need not detail the court's reasons, nor consider the matter further, except to express surprise that, in light of their additional burden to overcome the district court's findings, they continue to press a charge that was baseless to begin with.

Secondly, it is claimed that in deciding not to elicit from certain witnesses the names of Senate President Kevin B. Harrington and former Governor Francis W. Sargent as recipients of questionable MBM payments, trial counsel were moved by concern for them rather than the interests of the defendants.[1] Finally, defendants say that if, in fact, their counsel considered solely defendants' best interests, there was, nonetheless, a constitutionally impermissible conflict of interest which required a new trial.

Taking first the issue whether trial counsel in fact gave weight to the interests of Harrington and Sargent, there is no direct testimony, nor could any reasonably be expected. Defendants must establish their claim by inference from the circumstances. The circumstances are these. About one year prior to the return of the indictments in this case, DiCarlo was informed by Harrington that DiCarlo was the object of federal criminal investigation. Harrington suggested that DiCarlo obtain the services of an attorney. He recommended Walter J. Hurley, an experienced criminal defense lawyer, at all times relevant to this case associated in the practice of law with Thomas M. Joyce. Joyce was a well known lobbyist, with many friends in Massachusetts political circles, including Harrington and then Governor Sargent. DiCarlo met with Joyce, who stated that he knew someone in the Justice Department who would keep him abreast of the progress of the investigation, and thus enable him to alert Hurley of any developments.

[1] We agree with the trial court that of all the alleged shortcomings of trial counsel, the only one with any plausible relationship to the alleged conflict of interest is failure to use these names.

DiCarlo retained Hurley. Thereafter, learning from Hurley that MacKenzie was also under investigation, DiCarlo so informed MacKenzie. MacKenzie told DiCarlo that he intended to retain his present counsel, Earle C. Cooley, and DiCarlo reported this to Hurley. Hurley urged DiCarlo to persuade MacKenzie to retain, instead, Robert V. Mulkern, a lawyer unconnected with him, or Joyce, but who he believed would cooperate in a coordinated defense. MacKenzie acceded, but, at various times thereafter, expressed dissatisfaction. DiCarlo, at Hurley's prompting, reassured MacKenzie that Mulkern was properly handling the case. It is unclear from the record whether Hurley was a partner of Joyce, or simply an associate, but, in any event, Joyce said he would set the fee, and ultimately did so.[2] DiCarlo's checks to Hurley were endorsed for deposit to the account of Joyce's law firm.

On the sixth day of trial, the Assistant U.S. Attorney, Edward J. Lee, furnished Hurley and Mulkern with materials containing reports of FBI interviews with MBM president McKee, who was then on the stand, and MBM officer, Jack Thomas, who had yet to testify. These materials revealed, *inter alia*, statements of MBM officials that they had made payments to certain Massachusetts politicians, including $2,000 to Harrington and two $10,000 payments to one Albert Manzi, at least one alleged to be a political contribution to then Governor Sargent. On receipt of this material, defense counsel asked their clients whether the information should be used for the defense. DiCarlo's affidavit states that he told his counsel to use the information, "if it's helpful. Bring it out. Withhold nothing." The trial transcript reveals that both defense counsel used the general material extensively. During cross-examination of the MBM witnesses, who were crucial to the govern-

[2] The record in no way supports some seeming suggestion in defendants' brief that Joyce said he would himself pay the fee.

ment's case, the issue of MBM's political contributions, nationwide, was probed in great detail, but the names of these recipients were not mentioned. Defendants now claim their counsel improperly refrained out of consideration for Harrington and Sargent.[3]

We agree with the court's finding that there were substantial risks involved in using these names which prudent counsel might very reasonably wish to avoid. The jury might have viewed the dragging of prominent figures into the case a desperate, but not exculpatory, tactic, particularly if they had responded and denied receipt. Conversely, if it should appear that these contributions were in fact made, and illegal—there is some suggestion that the second alleged payment to Manzi was the result of raw political blackmail—it is hard to see how this would have helped persuade a jury that MBM had not been subject to, and capitulated to, similar conduct by defendants.

In this posture defendants argue that if, in fact, MBM had made these prior payments it would have had "friends in high places" enabling it to resist importunities by defendants. The suggestion that $2,000 purchased all-risk insurance, or that Harrington, for that amount, if requested, would have gone to DiCarlo and said, "You lay off." is not credible. Even less persuasive would be the thought that Sargent, the Republican governor, could have gone to the Democratic chairman purportedly investigating

[3] Defendants also complain of their counsels' failure to accept the government's offer to locate one William Masiello and secure his presence at the trial, allegedly because he had been a former client of Mulkern. Quite apart from the fact that Masiello's purported testimony was supplied only by a hearsay affidavit, *cf.* 6 J. Moore, Federal Practice, ¶ 56.11 [1.-2] at 200 (2d ed. 1976), the court found that he would have been a dangerous witness ("foolhardy") for defendants to call. We agree with the court that the failure to call Masiello in no way prejudiced the defendants. *See United States* v. *Donatelli*, 1 Cir., 1973, 484 F.2d 505.

the propriety of a Republican-let contract, and said that MBM had paid enough already.

We accept the court's view that defendants have offered nothing to persuade it that defendants' counsels' decision was not a wise one. Nor is this overcome by defendants' claim that Hurley had a motive that conflicted with a decision to bring Harrington's and Sargent's names into the case—Joyce's friendship with these individuals. Concededly, Harrington and Sargent would have preferred not to be mentioned as recipients of possibly illegal payments,[4] but, aside from that publicity, they have not been shown to have any other interest inconsistent with those of the defendants. In fact, Harrington, at least, could be thought to have had a substantial interest in defendants' acquittal. One need not read the newspapers to conceive the pall cast upon the legislature as a whole by an extortion conviction of two prominent senators.

It is true that Joyce, as a lobbyist, wanted to cultivate friends with political power. Any concern for Sargent, however, would have been diminished by the fact that he was out of office by the time of trial. While he was friendly with Harrington, so he was with DiCarlo, who had already risen to a position of power. To put it crassly, we may wonder how it would improve his stature as a lobbyist if he were to sell out one senator, who was his client, for an incidental benefit to another, who was not.

Defendants respond that the circumstances were such that they needed to prove no more than a possible conflict

[4] In light of the present widespread concern over the MBM matter, of which we may take judicial notice, viewed by hindsight it would have been a considerable benefit to Harrington to have avoided the subject of the $2,000 check, provided that such silence would have ended the matter. However, this information was in the government's possession to begin with, and silence could not have been assured, regardless of whether defense attorneys pursued this line of inquiry.

of interest, not an actual conflict. Concededly, there are such cases, but this was not one. In *Miller* v. *United States*, 1 Cir., 1977, 564 F.2d 103, we announced the standard by which claims of ineffective assistance of counsel based upon a conflict of interest are to be tested. There we distinguished between cases involving the joint representation of co-defendants by one attorney, or members of the same firm, and cases of dual representation where an attorney presently has, or in the past has had, a legal relationship with a hostile party or witness. In the case of joint representation of codefendants we held that only a relatively slight showing of actual prejudice is required to establish ineffective assistance of counsel, because there an attorney "is particularly susceptible to disabling conflicts." *Id.* at 106; *Holloway* v. *Arkansas*, 46 U.S.L.W. 4289, 4293 (U.S., Apr. 3, 1978). However, where dual representation is involved, the danger of conflicts is not so great. Accordingly, a real conflict of interest or a specific instance of prejudice must be shown. *Id.* at 106; *see United States* v. *Jeffers*, 7 Cir., 1975, 520 F.2d 1256, *cert. denied*, 423 U.S. 1066; *United States* v. *Donatelli*, 1 Cir., 1973, 484 F.2d 505.

Defendants contend that their case presents similar dangers of conflict and thus should be governed by *Miller's* joint representation standard. However, the special scrutiny given to instances where codefendants are represented by single counsel is not warranted here. First, obviously, there was no actual joint representation; each defendant had separate, unrelated counsel. Secondly, defendants do not claim that there ever was any attorney-client relationship between Joyce, Hurley or Mulkern and Harrington or Sargent. Finally, it is unsound to analogize the position of Harrington and Sargent to that of codefendants. Neither had been charged nor brought to trial. Disclosing their names to the jury as recipients of MBM's payments could not have increased their potential criminal liability, nor

could any tactic by defendants' counsel have decreased that liability. Even if their names were not used, neither Harrington or Sargent, nor Joyce or Hurley could insure that the information, which the government already had, would not be revealed.

We, of course, do not suggest that an attorney may not have a pecuniary interest creating what we would term a per se disabling conflict. *See, e.g., United States* v. *Hurt*, D.C.Cir., 1976, 543 F.2d 162. When, however, the pecuniary interests are solely speculative—"the mere possibility of additional work for a former client,"—"the presumption [is] that the lawyer will subordinate his pecuniary interests and honor his primary professional responsibility to his clients in the matter at hand." *United States* v. *Jeffers*, ante, at 1265; *see, also, United States* v. *McCord*, D.C.Cir., 1974, 509 F.2d 334, 351-53, *cert. denied*, 421 U.S. 930.

Particularly is there a heavy burden on a defendant when the facts were known to him from the beginning, *United States* v. *James*, 5 Cir., 1975, 505 F.2d 898, *cert. denied*, 421 U.S. 1000, or, as in this case, long before the trial ended instead of afterwards. Defendants selected Hurley precisely because Joyce had political connections. Such connections are not simplistic, but extend in many directions. The least defendants could expect was the possibility of some interface. The least that, in turn, could be expected of defendants would be to make their own decisions when some such matters surfaced. Defendants were in no respect naive or unsophisticated. Nothing was concealed from them, including the fact that day after day the trial was proceeding without their counsel disclosing the names to the jury. They do not excite our sympathy when, having lost their case, they malign their counsel, and say they were put upon. Defendants have failed to allege or establish a real conflict of interest or any actual prejudice. They are entitled to no relief. *Miller* v. *United States*, ante.

Brady *violation.*

Defendants next contend that the government's failure to disclose two letters written by Assistant U.S. Attorney Lee to prospective customers of MBM violated their right to a fair trial under *Brady* v. *Maryland,* 1963, 373 U.S. 83. The letters were written prior to trial in response to inquiries by certain governmental agencies that were considering awarding contracts to MBM. After describing the indictment, MBM's role, and its cooperation with the government, the letters conclude that the U.S. Attorney was "not aware of any reason why [MBM] should be disqualified from public work." In their discovery request, defendants sought,

> "23. All statements or promises or rewards of any kind, or tending in any way, directly or indirectly, to induce or encourage the giving of testimony, which statements have been made to any persons whom the Government intends to call as witnesses at the trial of the indictment herein.
>
> "24. All evidence of any kind favorable to the defendants material either to guilt or punishment, including without limitation that which may tend to be exculpatory, to impeach or discredit incriminatory evidence or to mitigate the crime charged, or which may lead to evidence of such character."

Defendants maintain that the letters were recommendations of MBM by the government that would have been of value for impeaching MBM witnesses.

Since defendants posit their principal argument upon *United States* v. *McCrane,* 3 Cir., 1976, 547 F.2d 204, *re-affirming,* after remand, 427 U.S. 909, for further consideration in light of *United States* v. *Agurs,* 1976, 427 U.S. 97, *United States* v. *McCrane,* 3 Cir., 1975, 527 F.2d 906,

we start with an examination of that case. There the defendants requested,

> "all material known to the government . . . which is exculpatory in nature or favorable to the defendant, or may lead to the discovery of exculpatory material or material which may be used to impeach prosecution witnesses . . . ."

In response to a request by counsel for the principal prosecution witness, the U.S. Attorney wrote letters about the witness to parties proposing to enter into contractual relations with him, corresponding much, in general outline, to the case at bar. In the earlier case of *Brady* v. *Maryland,* ante, the prosecuting attorney, in response to a request, had failed to disclose a statement of a third party that could be regarded as exculpatory.

The Court held,

> "[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87.

The first *McCrane* court, after noting that impeaching evidence fell within *Brady,* stated that a promise of preferential treatment given to a witness by the government is admissible for impeachment purposes. It went on to say that "jurors might have felt that the mere act of writing the letters was preferential treatment." 527 F.2d at 911-12. It, accordingly, found a violation of *Brady* and ordered a new trial.

Although in *Brady* the Court made no point of it, the request called for all statements of a designated individual, and hence was, in fact, a "specific" request. In the initial *McCrane* opinion the court did not discuss the nature of the request. In *United States* v. *Agurs,* 1976, 427 U.S. 93, however, the Court distinguished between general and

specific requests. Refusal of a "specific and relevant" request "is seldom, if ever, excusable." 427 U.S. at 106. This kind of request calls for any material evidence, *i.e.*, "evidence [that] might have affected the outcome of the trial." *Id.* at 104.[5] On the other hand, the Court said that a general request, *e.g.*, "all Brady material," or "anything exculpatory," involves a very different standard.

> "The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." *Id.* at 112-13. [Footnotes omitted.]

Upon remand for reconsideration in the light of *Agurs*, the *McCrane* court concluded that its prior decision was correct under either alternative. If the defendant's request were to be construed as merely general, the evidence met

[5] For the benefit of the bar we do not read this phrase as corresponding with a later remark by the Court that "a jury's appraisal of a case 'might' be affected by an improper or trivial consideration as well as by evidence giving rise to a legitimate doubt on the issue of guilt." *Id.* at 108-9. Rather, we would apply the usual rule of demonstrably harmless error. *Chapman* v. *California*, 1967, 386 U.S. 18, 24. Nor, of course, must a request be answered just because it is specific. The initial question is whether it is *Brady* material.

Agurs's standard of materiality. But also, and it is for this that defendants seek to rely on it, the court regarded the request as specific, hence imposing the more liberal standard of materiality. In resolving this latter issue in favor of defendant the court relied on a statement in the government's brief which, although the government expressly denied that the request was specific, the court construed as a concession that it was. We will not pursue the correctness of the court's construction; the government makes no such statement here.[6] However, unless the government had so conceded, we consider the *McCrane* request a classic example of a non-specific request as defined in *Agurs*, and decline to accept *McCrane*'s contrary view. *See United States* v. *Hearst*, N.D.Cal., 1977, 435 F.Supp. 29, 30-31, *aff'd*, 9 Cir., 563 F.2d 1331, 1352.

We also reject *McCrane*'s above-quoted statement that "the mere act of writing the letters was preferential treatment," unless read in conjunction with the evidence, elsewhere noted, that they were written at the request of the witness's counsel. This, however, brings us to the case at bar, where defendants claim that No. 23 was a specific request.

In construing No. 23 as not calling for the U.S. Attorney's letters the district court said,

> "The subject letters were not 'recommendations,' were not communications to or requested by MBM and were neutral in their impact."

For present purposes we will assume the incorrectness of part of this statement; the letters were sufficiently recommendatory that we would consider them to be "rewards"

[6] We do, however, note the extraordinary claim in present defendants' brief that the concession by government counsel in this unrelated case in another circuit estops the government here. This would be extraordinary even if defendants could claim, which they make no pretense of doing, that they knew and relied on it, a necessary condition of estoppel.

if, but only if, a statement had been made to a MBM witness which put them in that light. There was no impeaching significance in the letters themselves. They were not relevant unless, as the final clause of the request specified, they were intended to influence the witness. Clearly, they could not influence the witness unless there had been a statement to him, either a promise that they would be written, or, at the least, subsequent communication enabling him to realize that he had been rewarded. Not only is this clear, but the request itself, which appears carefully drawn, recognizes there would have had to have been a "statement" to the witness. The specificity of the request, in other words, related to any statement, not to the letters themselves.[7] There is nothing to overcome the U.S. Attorney's response that there was no such statement.

It may be conceded that the letters fell within the terms of a general request, of which No. 24 was a good example, seeking anything that might lead on to something else. Here, however, because of its generality, the government does not face the strict sanction which attends the refusal of a specific request. The district court properly applied the general test, and found that defendants failed.[8] We have considered the record, and find no reason to disagree.

Misconduct by jurors.

We may pass quickly over defendants' complaint, supported by the statements of two alternate jurors, that the jury was exposed to certain unspecified newspaper and television accounts of the trial, and that the jurors discussed the case among themselves. The district court held these assertions to be "insubstantial" and that the documents submitted revealed no "material derogation of the defendants' right to a fair trial," and thus neither an evidentiary hearing nor a new trial was warranted.

[7] Alternatively, if the request sought more, it failed to meet the basic requirement of a specific request, "notice of exactly what the defense desired." *Agurs*, 427 U.S. at 106.

[8] "[The] letters would not in my view have created a reasonable doubt as to the guilt of the defendants, in the light of strong and persuasive evidence of guilt introduced at the trial. In the language of the Supreme Court the omission to furnish these letters was not material 'in the context of the entire record.' *United States* v. *Agurs, supra*, 112."

Defendants waived sequestration of the jury, thereby assuming the risk that the jurors would come in contact with some publicity concerning the trial. No relief is warranted without a showing that the publicity resulted in prejudice. *United States* v. *Perrotta*, 1 Cir., 1977, 553 F.2d 247; *United States* v. *D'Andrea*, 3 Cir., 1974, 495 F.2d 1170, *cert. denied*, 419 U.S. 855. Court and counsel carefully monitored the press coverage of the trial. On two occasions a potentially prejudicial article and television report were brought to the court's attention. Following the procedures required by *Perrotta*, the court polled the jurors as to whether they had seen them. In each case, all jurors responded that they had not.

Defendants now claim that similar inquiry should have been made as to other unspecified publicity allegedly seen or heard by the jurors. The court was correct in rejecting this claim. Absent specification of particular pieces of publicity, and a showing of their potentially prejudicial effect, it had no duty to inquire further.

The court also found insubstantial defendants' claim of pre-deliberation discussion of the case by the jurors, and consideration by the jurors of defendants' failure to testify. We agree. Quite apart from the fact that the alternate juror, who was the source of the statement that the jurors considered the defendants' failure to testify, was not present during the jury's deliberations following the court's charge, this claim flies in the face of the familiar principle that a verdict may not be impeached by a juror's testimony that the jury was guilty of misconceptions of fact or law, employed unsound reasoning, indulged in improper argument, etc. *See, e.g., Young* v. *United States*, 10 Cir., 1947,

163 F.2d 187, *cert. denied,* 332 U.S. 770; 6A J. Moore, Federal Practice, ¶ 59.08[4] at 148-49 (2d ed. 1974). While there are exceptions, the present case is far from such.

Newly discovered evidence.

Defendants submitted three unsworn statements, two by witnesses at the trial, and one by the wife of one such witness, to support their claim, pursuant to F.R.Crim.P. 33, for a new trial on the ground of newly discovered evidence. The purported evidence takes the form of the recantation of two witnesses, Harding and Shields, concerning the July 6, 1972 meeting in New York City at which some of defendants' extortionate threats allegedly were made. The witnesses did not retract their testimony as to the fact of the meeting, but only suggested that they had been mistaken as to its date, which they now believe to have been sometime during the spring of 1972.

So much was deficient with respect to these statements that we merely list the areas. Passing the fact that the court expressly disbelieved Shield's new version,[9] and impliedly did so as to Mr. and Mrs. Harding, whose statements, it found, were at least in part dictated by DiCarlo's new counsel, no explanation is offered for six months' delay, rather than eliciting this testimony at trial, or is offered to meet the "considerable skepticism," *Lemire* v. *McCarthy,* 1 Cir., 1978, 570 F.2d 17, 21, which attends recantation. The trial court's findings will not be disturbed. *United States* v. *Johnson,* 1946, 327 U.S. 106, 111-12.

We have considered the other arguments advanced by defendants and find them to be without merit. The order of the district court is affirmed.

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[9] As to Shield's testimony, the court noted,
"Mr. Shield was an extremely articulate, assured and self-possessed witness. His manner was somewhat hostile to the United States Attorney. I cannot credit [defendants' claim] that untrue testimony was extracted from him against his will."

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,
Plaintiff,

v. CRIMINAL NOS. 76-339-1-S
76-339-2-S

JOSEPH J.C. DiCARLO and
RONALD C. MacKENZIE,
Defendants.

MEMORANDUM AND ORDER ON
MOTION FOR A NEW TRIAL

January 17, 1978

SKINNER, D.J.

The defendants have filed and argued this motion for a new trial under Fed.R. Crim.P. 33. Among other things, they seek an evidentiary hearing on the questions raised in the motion. In their brief they suggest that the standard to be applied for holding an evidentiary hearing is that applicable to motions to vacate judgment under 28 U.S.C. §2255. This is not a motion under §2255, and such a motion might not presently be in order, since the defendants are not yet in custody. Newly discovered evidence must be asserted under Rule 33. The other grounds may not have been timely raised under Rule 33, but nevertheless might be the subject of a subsequent motion under §2255. To avoid rehearing these issues at some other time,

and to put them in a posture to be decided on the merits, I will treat the issues, other than newly discovered evidence, as if they were properly before me on a motion under 28 U.S.C. §2255.

The standard to be applied with respect to holding an evidentiary hearing under Rule 33 is the sound discretion of the court. The standard to be applied in §2255 appears in Rule 4 of the Rules Governing Section 2255 Proceedings:

> If it plainly appears from the face of the motion and any annexed exhibits and the prior proceedings in the case that the movant is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the movant to be notified.

A. NEWLY DISCOVERED EVIDENCE

1. Letters from Assistant United States Attorney to Potential Customers of MBM

The defendants are now in possession of two letters[1] from the Assistant United States Attorney written in answer to requests from potential customers of McKee-Berger-Mansueto, Inc. (MBM) for information as to the status of MBM. In each case the letter details the facts of the case and ends up with the assertion

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[1] Exhibit A to motion and Exhibit 1 to government's opposition.

that the United States Attorney knows of no reason why MBM should be "disqualified from public work." Defendants insist that they should have been given these letters in response to pre-trial discovery requests under the rule of Brady v. Maryland, 373 U.S. 83 (1963), in view of the fact that the government's principal witnesses were employees and former employees of MBM. The requests were as follows:

> "23. All statements or promises or rewards of any kind, or tending in any way, directly or indirectly, to induce or encourage the giving of testimony, which statements have been made to any persons whom the Government intends to call as witnesses at the trial of the indictment herein." [Emphasis supplied.]
>
> "24. All evidence of any kind favorable to the defendants material either to guilt or punishment, including without limitation that which may tend to be exculpatory, to impeach or discredit incriminatory evidence or to mitigate the crime charged, or which may lead to evidence of such character."

The emphasized language of request 23 specifically excludes the letters in question. Request 24 is so general as to place no burden on the government to produce the letters in addition to that which would be constitutionally required in the absence of any request. United States v. Agurs, 427 U.S. 97, 106-7 (1976). Applying the standards of the case just cited, I find and rule as follows:

The subject letters were not "recommendations," were not communications to or requested by MBM and were neutral in their impact. Even if they had been admissible, which is doubtful, they would not in my view have created a reasonable doubt as to the guilt of the defendants, in the light of strong and persuasive evidence of guilt introduced at the trial. In the language of the Supreme Court the omission to furnish these letters was not material "in the context of the entire record." United States v. Agurs, supra, 112.

United States v. McCrane, 427 F.2d 906 (3d Cir. 1975), vacated and remanded, 427 U.S. 909 (1976), following remand, 547 F.2d 204 (3d Cir. 1976), relied upon by defendants, even if it states the law in this circuit, is distinguishable on all of the above grounds.

Accordingly, the failure of the government to furnish the letters to the defendants before trial does not require an evidentiary hearing and does not warrant the allowance of the defendants' motion.

2. Recanted Testimony of Harding and Shields

Defendants concede that recantation of testimony is viewed with suspicion by courts. Mr. Harding's attention was focused on the meeting with defendants in New York during conversations with FBI agents and the U.S. Attorney, during his grand jury testimony and at the trial of this case. Suddenly, six months after the trial, upon being visited at their

home by defendant DiCarlo's new attorney Francis J. DiMento[2] and by his cousin William DiMento, a former legislative assistant to DiCarlo, Mr. and Mrs. Harding remember details of clothing that place the meeting in cold weather, earlier than the July 6 date relied upon by the government. The circumstances and timing of this resurrection of memory do little to dispel the traditional suspicion referred to above.

Mr. Shields' unsworn statement asserts that his testmony was incorrectly extracted from him as a result of suggestion by the United States Attorney and "exhaustive questioning." In exercising my discretion in the matter of granting a new trial, I must rely to some extent on my personal observation of the witness. Mr. Shields was an extremely articulate, assured and self-possessed witness. His manner was somewhat hostile to the United States Attorney. I cannot credit the statement that untrue testimony was extracted from him against his will. The statements of Harding, Mrs. Harding and Shields annexed to the motion do not warrant the allowance of a motion for a new trial.

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2 At argument, it appeared that these statements and those of Mr. Shields were in part dictated, at least as to form, by Attorney DiMento himself.

B. MISCONDUCT OF JURORS

The defendants allege that the trial jurors disobeyed instructions in that they read newspaper accounts and watched television reports of the trial, and further that they discussed the case among themselves. This assertion is supported by an affidavit of one alternate juror and a report of a newspaper interview with another alternate juror. Neither juror participated in the verdict.

When the decision was made not to sequester the jury, a decision assented to by the defendants, it was to be expected that the jury would be exposed in some degree to publicity about the trial. The question is whether such publicity was prejudicial. United States v. D'Andrea, 495 F.2d 1170 (3d Cir.), cert. denied, 419 U.S. 855 (1974); see United States v. Perrotta, 553 F.2d 247, 249 (1st Cir. 1977).

Defendants assert that the court is required to hold an evidentiary hearing on their allegations. That might be true under some circumstances if any substantial instances of prejudice were asserted. In this case, however, the media coverage was carefully monitored by counsel and the court. It consisted, for the most part, of straighforward reports of the trial proceedings. Such editorial comment as occurred was generally favorable to the defense. On two occasions, articles having to do with extraneous matters appeared in weekly newspapers of relatively limited circulation, and on one occasion prejudicial comments were made in a television newscast. In each case

inquiry was made of the jurors, all of whom responded that they had not read the articles or heard the program.

The defendants' motion does not refer to any other prejudicial item of publicity, trial counsel mentioned none, nor were present counsel able to furnish me with an example at argument on this motion. In the absence of some indication of the existence of evidence of actual prejudice, the assertions of counsel do not warrant the allowance of the motion for a new trial.

Discussion of the case among the jurors prior to being excused to deliberate was a violation of the court's instruction, strictly construed. The important thing, however, is that the jury resist any systematic discussion which would foreclose open-minded consideration of the whole case. Nothing in the defendants' supporting documents suggests that the latter occurred, and in fact the jury deliberated for seven hours before reaching a verdict. The defendants cite no authority for granting a new trial under these circumstances.

One alternative juror has said, apparently in response to a reporter's question, that it might have made a difference in the result of the case if the defendants had taken the stand and denied their guilt. This statement falls far short of suggesting that the jurors used

the fact that the defendants elected not to take the stand to overcome any reasonable doubt of the defendants' guilt. The same juror is reported to have said, in fact, that, "There was so much evidence, but just by the facts that were presented, it did seem to me that they were guilty."[3]

Accordingly, I find and rule that the defendants' assertions of jury misconduct are insubstantial, that the supporting documents do not indicate that there was any material derogation of the defendants' right to a fair trial, and that nothing before me warrants the holding of an evidentairy hearing or the allowance of the defendants' motion for a new trial.

C. INEFFECTIVE ASSISTANCE OF COUNSEL

The defendants finally assert that they were deprived of their Sixth Amendment right to effective counsel. For purposes of this motion I will assume the following facts contained in the defendants' affidavits:

About a year prior to the return of the indictment in this case, DiCarlo was informed by Kevin Harrington, the president of the Massachusetts Senate, that DiCarlo was the object of a federal investigation which might result in an indictment. He

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[3]Exhibit AA to the defendants' motion.

suggested that DiCarlo secure the services of Attorney Walter Hurley, described as an associate of Attorney Thomas Joyce. Attorney Joyce is a lobbyist who is well-known to Harrington, DiCarlo, MacKenzie, and many other political figures in Massachusetts, including former Governor Francis W. Sargent.

DiCarlo followed this advice and retained Attorney Hurley. DiCarlo learned from Hurley that MacKenzie was involved in the investigation and so informed MacKenzie. MacKenzie indicated that he would engage Attorney Earl Cooley, his present counsel, and DiCarlo reported this to Hurley. Hurley strongly urged DiCarlo to persuade MacKenzie to engage Attorney Robert Mulkern, of Worcester, because of the necessity of a coordinated defense. DiCarlo was successful, and MacKenzie retained Mulkern. One of the reasons for retaining Hurley and Mulkern was that they were in contact with Joyce, who was supposed to have a source of information in the Department of Justice in Washington which would enable him to report the progress of the government's investigation.

At various times MacKenzie expressed some dissatisfaction, but DiCarlo, at Hurley's insistence, persuaded MacKenzie that Mulkern was properly preparing the case. The amount of the fee paid Hurley was established by Joyce and endorsed for deposit to the account of Joyce's law firm.

I will further take judicial notice of the fact that Hurley and Mulkern are attorneys of good reputation; that Hurley in particular is a specialist in the defense of criminal cases in both state and federal courts, and has had particular experience in cases charging public officials with corrupt acts, including Hobbs Act cases; and that Hurley and Mulkern have previously worked as co-counsel in the defense of criminal cases, notably the so-called small loans cases in the state courts. These matters were called to the attention of present defense counsel, who agreed as to the accuracy of the above.

Defendants argue that trial counsels' connection with Joyce caused them to subordinate the interest of the defendants to those of Joyce's associates, Harrington and Sargent, by failing to use certain evidence and undertake certain lines of cross-examination. Of the various alleged failings of counsel, only one can conceivably have any relationship to the allged relationship of the lawyers to Joyce, and through im to Harrington and Sargent.

No possible reason had been suggested for supposing that the conviction of the defendants would be of any possible advantage to Harrington and Sargent. DiCarlo was a close associate of Harrington. The conviction of both defendants was likely to diminish the reputation of the Senate and of Harrington as its presiding officer. Sargent had been out of office since 1974. Accordingly, with respect to all of the alleged failures of counsel except the

decision not themselves to use the name of Harrington and Sargent, the standard of judgment is not that applicable to "joint" or "dual" representation, but that applicable to allegations of ineffective representation of counsel generally. That standard is whether ineptness of counsel rendered the defense a sham, a farce, or a mockery. Moran v. Hogan, 494 F.2d 1220 (1st Cir. 1974).

With respect to the alleged failure to use supposed alibi evidence and cross-examine on supposed promises to MBM, I find that there was a sound tactical basis for each decision. In making that finding I have reviewed the significant sections of the twenty-three volume transcript of the trial, and considered the defendants' allegations in terms of the utility of the evidence, consistent strategy, and exposure to rebuttal by the government. A detailed recapitulation of my review would require a summary of the entire trial. I am satisfied that the conduct of counsel did not render the defense such a farce and mockery as would require a new trial. Moran v. Hogan, supra.

On the sixth day of trial, the Assistant United States Attorney furnished the defendants with material required under 18 U.S.C. §3500 with respect to the witness McKee, who was on the stand, and witness Jack Thomas, who had not yet testified. This material revealed, among other things, statements of MBM officials that they had made a payment of $2,000 to Senate President Harrington and two further payments to one Albert Manzi,

purpotedly for the campaign fund of Governor Sargent, in response to a threat that if no payment were made Manzi would see to it that MBM received no contracts from the state Bureau of Building Construction. Defense counsel made a motion for a mistrial on the ground that this material was exculpatory and should have been furnished in advance of trial in accordance with Brady v. Maryland, 373 U.S. 83 (1963).

I denied this motion on the ground that the material was not exculpatory. I also made it clear to all counsel that there were no restrictions on the use of the material in cross-examination of the government's witnesses. Defense counsel stated that they considered the question of MBM's activities important but that the names weren't important. The Assistant United States Attorney made it clear that if the matter were pursued, it was likely that the names of the alleged payees would be brought out "in order to make the record clear from the government's point of view." (T. 6-20 through 6-48).[4]

Thereafter defense counsel pressed the question of MBM's political contributions at every stage of cross-examination of MBM's witnesses, at greath length and in great detail. At any point, the names of Harrington and Manzi could have come out through the witnesses or on redirect examination.

---

[4]The word "galloped" on 6-26, l. 23, should be "galloping."

DiCarlo's affidavit says that he told his attorney to use this material "if it's helpful. Bring it out. Withhold nothing." The transcript clearly shows the extensive use of the material by both defense counsel. Present counsel say that it was also incumbent on counsel to bring out the names of Harrington, Sargent, Kelly and White as recipients of payments. The defendants' directions were not so explicit. I find that reasonable attorneys could differ with present counsel as to the unmixed blessings which would accure to the defendants if they themselves attempted to involve other well-known political figures in the case. The record reveals no failure to exercise proper professional judgment.

Defendants also say that trial counsel should have made greater attempts to find the ubiquitous Masiello and put him on the stand. In my view, given that Masiello was trying to avoid testimony, and would be reluctant and possibly hostile, given his relationship to the defendants and to Kelley, and given his presence at various critical meetings, prudent counsel might well consider that to expose him to cross-examination by the United States Attorney would be foolhardy. The defendants' allegations describe "dual representation," not "joint representation" and specific instances of prejudice must be shown. Miller v. United States, No. 77-1193 (1st Cir., October 27, 1977). It plainly appears from the record that no specific instance of prejudice occurred and no evidentiary hearing is necessary.

Defendants in their brief point out that failure of effective assistance of counsel may not always appear on the "cold printed record." This may be true when the matter is presented to an appellate court. On a motion for a new trial, however, the trial judge has the benefit of his own observations. Such observations are far from infallible, but may be relied upon to some extent when confirmed by the record. It was may observation that the defense was conducted by counsel with ingenuity and vigor. Every reasonable motion was presented and objection taken. Interrogation and argument was forceful, thorough and skilled.

Upon a complete review of the record, I am satisfied that the defendants were well represented by able and loyal counsel.

D. IN GENERAL

In considering a motion for a new trial, the court should consider not only the specific allegations separately, but together, to determine if in the aggregate they demonstrate that the defendants were deprived of a fair trial.

Upon examination of the entire record, I am satisfied that the defendants received a full and fair trial, and were convicted on the basis of substantial credible evidence which fully warranted a finding of guilt beyond a reasonable doubt.

Accordingly, the motion for a new trial is DENIED. The motion for bail and for a stay of execution is DENIED.

The government's motion for immediate surrender of the defendants is ALLOWED, the defendants to be surrendere forthwith.

WALTER JAY SKINNER
United States District Judge

AFFIDAVIT

Suffolk, ss. Boston, Massachusetts
December 12, 1977

I, Edward J. Lee, being duly sworn, herby depose and say as follows:

1) I am an Assistant United States Attorney, and under the direction of the United States Attorney, James N. Gabriel, was responsible for preparation and prosecution of the case of United States v. Joseph J.D. DiCarlo and Ronald C. MacKenzie, Criminal No. 76-339-S;

2) At no time during the investigation or trial of the above-captioned case did I state, represent, or pormise to Gerald McKee or any other representative of MBM, that I, or anyone associated with the Government, would write any letter of recommendation in connection with any business enterprise in which MBM was engaged, or wished to engage, as any inducement or reward for testimony or cooperation by MBM with the Government. Nor did I, or anyone associated with the Government to my knowledge, ever write or offer to write such a letter of recommendation;

3) I further state that the sole representations made on behalf of the Government to MBM and its officers and employees were those set forth in Exhibit U to Defendants' Motion for a New Trial.

/s/ Edward J. Lee
EDWARD J. LEE
First Assistant
U.S. Attorney

Then personally appeared the above-named Edward J. Lee and made oath that the foregoing statements are true to the best of his knowledge and belief.

Before me.

/s/ Ruth A. Pike
NOTARY PUBLIC

My Commission
Expires: 7-18-80

Supreme Court, U. S.
FILED
AUG 23 1978
MICHAEL RODAK, JR., CLERK

No. 77-1797

In the Supreme Court of the United States

OCTOBER TERM, 1978

JOSEPH J.C. DICARLO AND RONALD C. MACKENZIE,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

PHILIP B. HEYMANN,
Assistant Attorney General,

JOHN J. LOFTUS,
Attorney,
Department of Justice,
Washington, D.C. 20530.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 575 F. 2d 952. The opinion of the district court (Pet. App. 17a-31a) is not published.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 1978. Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to June 19, 1978, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners' trial counsel had a conflict of interest that deprived petitioners of the effective assistance of counsel.

2. Whether the government improperly withheld exculpatory evidence.

STATEMENT

Following a jury trial in the United States District Court for the District of Massachusetts, petitioners, former members of the Massachusetts State Senate, were convicted of extortion affecting interstate commerce, in violation of 18 U.S.C. 1951; of using the facilities of interstate commerce for the distribution of the proceeds of an unlawful activity, in violation of 18 U.S.C. 1952; and of conspiracy, in violation of 18 U.S.C. 371, 1951, and 1952. Petitioners received concurrent one-year terms of imprisonment on each of the substantive counts and a two-year suspended sentence on the conspiracy count; they were each fined $5,000. The court of appeals affirmed (565 F. 2d 802) and this Court denied certiorari (No. 77-990, March 20, 1978).

The evidence underlying petitioners' conviction was outlined by the court of appeals (565 F. 2d at 803-804). Briefly, the evidence showed that petitioners extorted $40,000 from McKee-Berger-Mansueto, Inc. ("MBM"), a New York company that had been selected to manage the construction of the campus of the University of Massachusetts at Boston. Petitioner DiCarlo was the chairman and petitioner MacKenzie the ranking minority member of a committee of the state legislature formed to investigate cost overruns and other practices by MBM. Petitioners extorted the payments through threats of adverse committee recommendations. After the payments, the committee report recommended no action be taken against MBM.

In June 1975, a year before any indictments were returned, DiCarlo was informed by Massachusetts Senate President Harrington that DiCarlo was the object of a federal investigation. Harrington recommended that DiCarlo hire an attorney, Walter Hurley, a noted

Massachusetts defense lawyer and associate of Thomas Joyce. Petitioners knew Joyce to be a prominent lobbyist whose political contacts included Harrington and former Governor Sargent. Joyce was also reputed to have a source of information in the Department of Justice in Washington that would enable him to inform Hurley on the progress of the government's investigation against DiCarlo. Thus, Joyce later informed Hurley that MacKenzie was also under investigation. DiCarlo thereafter relayed this information to MacKenzie and urged MacKenzie to retain attorney Robert *v.* Mulkern, who, although not a member of Joyce's firm, was willing to cooperate in a joint defense. Because of DiCarlo's urgings, MacKenzie retained Mulkern (Pet. App. 4a-5a).

On the sixth day of petitioners' trial, while MBM president McKee was on the stand, the prosecutor gave defense counsel copies of FBI reports in which McKee and other MBM officers had admitted making payments to other Massachusetts potiticians, including $2,000 to Senate President Harrington and two payments of $5,000 each to Albert Manzi, at least one of which was purportedly a political contribution to then Governor Sargent. During a recess, Hurley and Mulkern sought their clients' advice on whether this information should be used for their defense. DiCarlo replied"if it's helpful. Bring it out. Withhold nothing" (see Pet. App. 5a, 29a).

When the trial resumed, "defense counsel pressed the question of MBM's political contributions at every stage of cross-examination of MBM's witnesses, at great length and in great detail" (Pet. App. 28a) but did not allude to Harrington or Sargent as recipients of the payments. However, at no time during the remaining 16 days of trial did petitioners protest the failure of trial counsel to disclose the names of Harrington and Sargent, complain

that the subject of MBM's political payments had not been adequately explored, or in any way intimate that their attorneys were incompetent or unresponsive to their wishes.

Nine months after their trial, and while their direct appeal was pending, petitioners filed two motions for a new trial contending, *inter alia*, that they had been denied the effective assistance of counsel and that material discoverable under *Brady* v. *Maryland*, 373 U.S. 83, had been improperly withheld. After considering petitioners' affidavit and exhibits, the district court denied their motions without an evidentiary hearing (Pet. App. 17a-31a).[1] The court of appeals affirmed in a well-reasoned opinion upon which we rely (Pet. App. 1a-16a).

ARGUMENT

1. Petitioners contend (Pet. 27-57) that they were denied the effective assistance of counsel because of a conflict of interest that manifested itself when neither of their separately retained attorneys elicited at trial that Senator Harrington and Governor Sargent had been recipients of MBM payments. Under petitioners' theory, this failure deprived them of the use of a "friends in high places" defense (Pet. 45-47)[2] and evinced a primary

[1]Because their direct appeal was decided before the district court could consider petitioners' motions, the district court treated petitioners' claims (other than that of newly discovered evidence) as if properly brought under 28 U.S.C. 2255. See Pet. App. 17a-18a.

[2]Petitioners' theory is that their trial counsel should have disclosed MBM's payments to Harrington and Sargent to demonstrate that MBM had no need to bribe petitioners because MBM already possessed "friends in high places" (Pet. 45). The suggestion is that, having already purchased the favor of a governor and senate president, MBM had no motive to spend any more money to ensure a favorable report from petitioner DiCarlo's investigation committee.

motivation on the part of their attorneys to protect Harrington's and Sargent's names from disclosure because one of the attorney's associates, Thomas Joyce, had a "close relationship with Harrington and Sargent" (Pet. 40). The record, however, belies any contention that petitioners were deprived of their right to loyal and effective counsel; nor were they entitled to an evidentiary hearing to explore this claim.

First, counsel's decision not to elicit that Harrington and Sargent were recipients of MBM payments provides no support for petitioners' speculation that the decision was motivated by conflicting loyalties. Rather, that decision had a sound basis in trial strategy. As the court below recognized (Pet. App. 6a):

> [T]here were substantial risks involved in using these names which prudent counsel might very reasonably wish to avoid. The jury might have viewed the dragging of prominent figures into the case a desperate, but not exculpatory, tactic, particularly if they had responded and denied receipt.

Moreover, counsel made extensive use of the information about MBM's payments, and cross-examined MBM's witnesses "at great length and in great detail" about the company's political contributions (Pet. App. 28a), even though in so doing there was a very real prospect, as the district court noted, that "[a]t any point" those names "could have come out" and the prosecution had previously warned that it might disclose the recipient's names if the defense explored the area of other payments at all (*ibid.*). Accordingly, petitioners' bare allegation that counsel's cross-examination was aimed at protecting others besides their clients does not suffice to establish a conflict of interest, since under the circumstances of this case that was a "reasonable trial tactic" which could furnish "an equally plausible explanation [for their]

actions." *United States* v. *Johnson*, 575 F. 2d 1347, 1359 (C.A. 5). See also *Foxworth* v. *Wainwright*, 516 F. 2d 1072, 1077 n. 7 (C.A. 5).

Second, petitioners have made no plausible showing that they suffered any actual prejudice from counsel's tactics. See, *e.g.*, *Miller* v. *United States*, 564 F. 2d 103, 106-107 (C.A. 1). The claim that identification of Harrington and Sargent as other recipients of MBM's funds would have provided petitioners with a defense that MBM did not need petitioners' favor and simply paid petitioners $40,000 as "campaign contributions" (Pet. 20 n. 4) is, to put it charitably, farfetched. As the court of appeals stated (Pet. App. 6a-7a):

> [I]f it should appear that these contributions were in fact made, and illegal—there is some suggestion that the second alleged payment to Manzi was the result of raw political blackmail—it is hard to see how this would have helped persuade a jury that MBM had not been subject to, and capitulated to, similar conduct by defendants.
>
> * * *The suggestion that $2,000 purchased all-risk insurance, or that Harrington, for that amount, if requested, would have gone to DiCarlo and said, "You lay off," is not credible. Even less persuasive would be the thought that Sargent, the Republican governor, could have gone to the Democratic chairman purportedly investigating the propriety of a Republican-let contract, and said that MBM had paid enough already.
>
> * * * * *
>
> It is true that Joyce, as a lobbyist, wanted to cultivate friends with political power. Any concern for Sargent, however, would have been diminished by the fact that he was out of office by the time of trial. While he was friendly with Harrington, so he was with DiCarlo, who had already risen to a position of power. To put it crassly, we may wonder how it would improve his stature as a lobbyist if he were to sell out one senator, who was his client, for an incidental benefit to another, who was not.

Finally, petitioners were fully aware of the facts alleged to constitute a conflict at all relevant times, and it is axiomatic that a conflict of interest arises only " 'if counsel, unknown to the accused and without his knowledgeable assent, is in a duplicitous position where his full talents * * * are hobbled or fettered or restrained by commitments to others.' " *Castillo* v. *Estelle*, 504 F. 2d 1243, 1245 (C.A. 5), quoting, *Porter* v. *United States*, 298 F. 2d 461, 463 (C.A. 5). Petitioners, however, not only knew of Joyce's political connections but in fact retained his associates because of those connections. Furthermore, both were well aware of the facts of the alleged conflict long before the trial had ended but made no objection (Pet. App. 9a). Thus, the court of appeals correctly noted, "[n]othing was concealed from them, including in fact that day after day the trial was proceeding without their counsel disclosing the names [of Harrington and Sargent] to the jury" *(ibid.)*.[3]

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[3]There is no merit to petitioners' further claim (Pet. 31-36) that they were entitled to an evidentiary hearing on the conflict of interest allegation. Where, as here, an allegation of a prejudicial conflict of interest is "palpably incredible" or "patently frivolous," a district court is amply justified in rejecting a motion for new trial after an examination of the files and affidavits. See *Blackledge* v. *Allison*, 431 U.S. 63, 76.

Holloway v. *Arkansas*, No. 76-5856, decided April 3, 1978, on which petitioners rely is wholly inapposite. There, one lawyer was appointed to represent three defendants. The defendants and the lawyer objected to the joint representation prior to trial, advising the court that there existed an actual conflict of interest that rendered effective joint representation impossible. Here, in contrast, each petitioner retained separate counsel, there was no conflict between their interests giving rise to the risks that existed in *Holloway*, and no claim of conflict was made until after conviction.

2. Petitioners also contend (Pet. 21-26) that they were denied a fair trial because the government failed to disclose certain materials allegedly discoverable under *Brady* v. *Maryland*, 373 U.S. 83, and *United States* v. *Agurs*, 427 U.S. 97. That contention is incorrect.

Petitioners' indictment in 1976 was reported in the national press. Subsequently, in mid and late 1976, the United States Attorney received letters from the Passaic Valley (New Jersey) Sewerage Commissioners and the City and County of San Francisco (App. 234, 276) inquiring whether the government's investigation of MBM had disclosed any improprieties by that company that would reflect on their fitness for selection for future contracts. In response, the Assistant United States Attorney assigned to the case replied to each request by stating (App. 235, 241):

> Neither McKee-Berger-Mansueto, Inc., nor any of its principals in the named-captioned indictment were charged as defendants or co-conspirators. Rather, the indictment charges that MBM and its principals were the victims of an extortion scheme alleged to be perpetrated by the defendants. In response to your additional inquiry, MBM and its principals have cooperated from the outset with federal authorities in the conduct of the investigation which led to the indictment. Further, this office is not aware of any reason why MBM should be disqualified from public work.

In a pretrial motion, petitioners sought discovery of the following (Pet. 13):

> 23. All statements or promises or rewards of any kind, or tending in any way, directly or indirectly, to induce or encourage the giving of testimony, which statements have been made to any persons whom the Government intends to call as witnesses at the trial of the indictment herein.
>
> 24. All evidence of any kind favorable to the defendants material either to guilt or punishment, including without limitation that which may tend to be exculpatory, to impeach or discredit incriminatory evidence or to mitigate the crime charged, or which may lead to evidence of such character.

The prosecutor did not consider these letters to come within petitioners' request or to be relevant to their case, and the case proceeded to trial without their disclosure. At trial four MBM officers testified extensively about their meetings with petitioners.

Petitioners claim that the letters were exculpatory and should have been disclosed under *Brady* because they would have tended to impeach MBM witnesses by showing government action favorable to MBM; they also claim that Paragraph 23 of their discovery motion was a "specific request" for the letters, noncompliance with which is "seldom if ever excusable" under *Agurs*, *supra*, 427 U.S. at 106. The court of appeals correctly rejected both claims.

The letters were clearly not exculpatory and had no significant impeachment value. If the letters had been written at the request of MBM, or in consideration for the cooperation and testimony of MBM witnesses, petitioners' argument might have some colorable basis. But there is no evidence or basis for suspecting any such *quid pro quo*. The letters were written in response to inquiries from third parties and did no more than recite what was alleged in the indictment and disclosed at trial.

Petitioners' claim that Paragraph 23 was a specific request for the letters is refuted by the face of Paragraph 23, which asked for "statements [which] have been made

to any persons whom the Government intends to call as witnesses at the trial * * *" (emphasis supplied). The letters were not statements made to any witness; they were letters to third parties who had no involvement in this case. Furthermore, as noted above, there is no basis for the claim that the letters were, in the language of Paragraph 23, "statements or promises or rewards * * * tending * * * to induce or encourage the giving of testimony * * *."[4]

Petitioners err in ~~conceding~~ contending (Pet. 21-25) that the decision below conflicts with *United States* v. *McCrane*, 547 F. 2d 204 (C.A. 3). Petitioners' discussion of that case fails to address its two significant distinguishing features: in *McCrane* the letters were written at the request of the witness, through his counsel, and, in addition, the verdict there had "only slight support and 'additional evidence of relatively slight importance might be sufficient to create a reasonable doubt.' " 547 F. 2d at 207, quoting from *Agurs, supra*, 427 U.S. at 113. In those circumstances the court of appeals concluded that the letters were sufficiently material to the defense to require disclosure

[4]As the court of appeals stated (Pet. App. 13a-14a):

> * * * [T]he letters were sufficiently recommendatory that we would consider them to be "rewards" if, but only if, a statement had been made to a MBM witnesses which put them in that light. There was no impeaching significance in the letters themselves. They were not relevant unless, as the final clause of the request specified, they were intended to influence the witness. Clearly, they could not influence the witness unless there had been a statement to him, either a promise that they would be written, or, at the least, subsequent communication enabling him to realize that he had been rewarded. Not only is this clear, but the request itself, which appears carefully drawn, recognizes there would have had to have been a "statement" to the witness. The specificity of the request, in other words, related to any statement, not to the letters themselves. There is nothing to overcome the United States Attorney's response that there was no such statement. [Footnote omitted.]

even in the absence of a specific request. Whether that decision was right or wrong, the case bears no resemblance to the instant case.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

PHILIP B. HEYMANN,
Assistant Attorney General.

JOHN J. LOFTUS,
Attorney.

AUGUST 1978.

[5]The court in *McCrane* went on to state, as an alternative ground, that the pre-trial request there, seeking "material which may be used to impeach prosecution witnesses," was a specific request for the letters at issue there within the meaning of *Agurs* (547 F. 2d at 207). While we believe that conclusion was erroneous, it is not in conflict with the decision below because (1) the reason it was deemed "specific" was the evidence (not present in this case) that the letters were written at the request of a witness's counsel, and (2) the letters were regarded as sufficiently material to require disclosure even in the absence of a specific request.